Supreme Court, U.S.
FILED

No.: 091209 APR 1 - 2010

In the OFFICE OF THE CLERK

Supreme Court of the United States

LEO TSIMMER,

Petitioner,

v.

DIRECTOR ANDREA QUARANTILLO, New York District Director of the United States Citizenship and Immigration Services; Director RUTH A. DOROCHOFF, Chicago District Director of the United States Citizenship and Immigration Services; Officer-in-Charge KATE LEOPOLE, Milwaukee Sub-Office, United States Citizenship and Immigration Services; Secretary JANET NAPOLITANO, of the Department of Homeland Security; Acting Deputy Director MICHAEL AYTES, of the United States Citizenship and Immigration Services; Department of Homeland Security; U.S. Citizenship and Immigration Services; and Acting U.S. Attorney LEV DASSIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MATTHEW L. GUADAGNO
Counsel of Record
KERRY WILLIAM BRETZ
JULES E. COVEN
BRETZ & COVEN, LLP
305 Broadway, Suite 100
New York, New York 10007
(212) 267-2555

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED FOR REVIEW

Whether the Second Circuit' case law that the doctrine of *res judicata* precludes a subsequent action that arises out of a "nucleus of operative facts" is contrary to this Court's requirement that there be a final adjudication on the merits, in order to invoke *res* judicata. As a result of the Second Circuit's case law on *res judicata*, Mr. Tsimmer's District Court action based upon the Administrative Procedure Act ("APA") challenging a decision by the former Immigration and Naturalization Service ("INS" or "Service") was erroneously dismissed due to *res judicata* because the dismissal of his prior petition for review challenged his exclusion order issued by an Immigration Judge. [1]

Whether the requirement of INA §242(a)(5), 8 U.S.C. § 1252(a)(5), that final orders of removal should only be challenged in the Court of Appeals via

---

[1] On November 25, 2002, President Bush signed into law the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, which created the new Department of Homeland Security ("DHS"). Pursuant to the provisions of the Homeland Security Act, DHS came into existence on January 24, 2003. As provided by the Homeland Security Act and by the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, the functions of the INS of the Department of Justice, and all authorities with respect to those functions, transferred to DHS on March 1, 2003, and the INS was abolished on that date. The functions of the former INS are now divided between the United States U.S. Immigration Customs Enforcement ("ICE") (law enforcement) and the United States Citizenship and Immigration Services ("CIS") (immigration benefits).

a petition for review, should be read broadly to preclude actions in District Court pursuant to the APA that seek to challenge an agency decision to deny an application that was not considered in immigration court.

LIST OF PARTIES

The Petitioner is Leo Tsimmer.

The Respondents are Director Andrea Quarantillo, New York District Director of the United States Citizenship and Immigration Services; Director Ruth A. Dorochoff, Chicago District Director of the United States Citizenship and Immigration Services; Officer-in-Charge Kate Leopole, Milwaukee Sub-Office, United States Citizenship and Immigration Services; Secretary Janet Napolitano, of the Department of Homeland Security; Acting Deputy Director Michael Aytes, of the United States Citizenship and Immigration Services; Department of Homeland Security; U.S. Citizenship and Immigration Services; and Acting U.S. Attorney Lev Dassin.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties iii

Table of Authorities vi

Appendix Index viii

Petition for a Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

I. THE SECOND CIRCUIT'S "NUCLEUS OF OPERATIVE FACT" TEST USED TO APPLY THE DOCTRINE OF RES JUDICATA IS RESULTING IN THE DOCTRINE BEING APPLIED WHERE THERE HAS NOT BEEN A FINAL JUDGMENT ON THE MERITS, AS REQUIRED BY THIS COURT. 6

II. THIS COURT'S PRECEDENT REQUIRES THAT THE REAL ID ACT'S JURISDICTION LIMITING PROVISIONS BE READ NARROWLY 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 398 (1981) 6
INS v. St. Cyr, 533 U.S. 289 (2001) 10
Lacy v. Principi, 317 F. Supp. 2d 444 (S.D.N.Y. 2004). 6
Matter of Castro, 21 I. & N. Dec. 379 (BIA 1976).... 11
Matter of C-H, 9 I & N Dec. 265 (Asst. Comm. 1961) 11
Matter of Manneh, 16 I. & N. Dec. 272 (BIA 1977). 11
Matter of Wong, 12 I. & N. Dec. 407 (BIA 1967) 11
Matter of Yauri, 25 I. & N. Dec. 103 (BIA 2009)..... 11
State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, 921 F.2d 409 (2d Cir. 1990) 6
Tsimmer v. Gantner, 550 F. Supp.2d 438 (S.D.N.Y. 2008) 1, 4
Waldman v. Village of Kiryas Joel, 207 F.3d 105 (2d Cir. 2000) 6

Statutes

28 U.S.C. § 1254(a) 2
28 U.S.C. § 1291 5
8 C.F.R. § 212.2 3
8 C.F.R. § 216.4(a) 2
8 C.F.R. § 216.5(a)(1)(ii) 2
8 U.S.C. § 1182(a)(5)(A)(i) 10

Page

8 U.S.C. § 1182(a)(7)(A)(i)(I) 10
8 U.S.C. § 1252(a)(5) ..... i, 2, 9
INA § 212(a)(5)(A)(i) 10
INA § 212(a)(7)(A)(i)(I) 10
INA § 242(a)(5) 2, 9
REAL ID Act § 106(a) 10
REAL ID Act § 106(a)(5) 9
REAL ID Act of 2005 ("REAL ID Act"), § 106(a)(5), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005) 2, 8

APPENDIX INDEX

Page

United States Court of Appeals for the Second Circuit Order, dated February 4, 2010 ..... 1a

United States Court of Appeals for the Second Circuit Summary Order, dated November 24, 2009 ..... 3a

United States District Court Southern District of New York Decision and Order, dated April 22, 2008 ..... 7a

United States District Court Southern District of New York Judgment, dated April 25, 2008 ..... 27a

Complaint with verification, dated September 29, 2006 ..... 29a

United States Court of Appeals for the Second Circuit Summary Order 63a

Statutory Provisions 69a

PETITION FOR A WRIT OF *CERTIORARI*

Leo Tsimmer respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's decision that dismissed Mr. Tsimmer's complaint, which was appealed to the Court of Appeals is a reported decision, *Tsimmer v. Gantner*, 550 F. Supp.2d 438 (S.D.N.Y. 2008). (App 7a). The opinion of the Court of Appeals, which dismissed Mr. Tsimmer's appeal from the District Court's dismissal of his complaint, is an unreported summary order. (App. 3a).[2] The order denying his petition for rehearing and hearing *en banc* is not reported. (App. 1a). Mr. Tsimmer's complaint was dismissed by the District Court based upon the doctrine of *res judicata* because the District Court deemed the facts of his complaint to arise from the same nucleus of operative facts as Mr. Tsimmer's petition for review that challenged his exclusion order. (App. 22a-26a). The order dismissing Mr. Tsimmer's petition for review is an unreported summary order. (App. 63a).

---

[2]The designation "App. _a" denotes a page in the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the Court of Appeals was entered on November 24, 2009. (App. 3a). On December 23, 2009, Mr. Tsimmer timely filed a petition for panel rehearing and rehearing *en banc*. The petition for panel rehearing and rehearing *en banc* was denied on February 4, 2010. (App. 1a).

STATUTORY PROVISIONS INVOLVED

Reprinted in the statutory index is REAL ID Act of 2005 ("REAL ID Act"), § 106(a)(5), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), which created INA § 242(a)(5), 8 U.S.C. § 1252(a)(5). (App. 69a).

STATEMENT OF THE CASE

Petitioner, Leo Tsimmer ("Mr. Tsimmer"), born on August 19, 1967, is a 42-year-old native and citizen of Russia. (App. 38a). Mr. Tsimmer was married to a United States Citizen and obtained conditional residence through her. (App. 38a-39a). Because Mr. Tsimmer was classified as a conditional resident, he was required to file Form I-751 with his wife, in order to remove the condition on his residence, and become a lawful permanent resident. 8 C.F.R. § 216.4(a). After filing Form I-751, Mr. Tsimmer and his wife separated and divorced. (App. 40a). Mr. Tsimmer then filed a new Form I-751 pursuant to 8 C.F.R. § 216.5(a)(1)(ii), to remove the condition based upon a marriage entered into in good

faith, which ended in divorce. (App. 40a-41a). Agents for the INS investigated the Form I-751 without realizing that Mr. Tsimmer and his wife were no longer married and they erroneously concluded that their marriage was fraudulent, when it was discovered that they were not living together. (App. 41a-43a).

While the I-751 petition was pending, Mr. Tsimmer traveled outside of the United States on advance parole pursuant to 8 C.F.R. § 212.2, so that when his I-751 was denied, he was classified as an alien seeking to enter the United States and placed in exclusion proceedings. (App. 40a, 45a-46a). During his exclusion proceedings, the Immigration Judge found that the evidence did not support a finding that Mr. Tsimmer had engaged in fraud, however, because he was in exclusion proceedings, he could not renew his request to remove the condition on his residence before the Immigration Judge. (App. 46a-47a). On July 15, 2002, the Board of Immigration Appeals ("Board" or "BIA") affirmed the Immigration Judge's decision. (App. 47a).

This case represents Mr. Tsimmer's second federal action relating to his I-751 petition. In Mr. Tsimmer's first federal action, he filed a petition for review in the U.S. Court of Appeals for the Second Circuit, which challenged the exclusion order by the Immigration Judge that was affirmed by the Board. (App. 64a). By a summary order dated May 26, 2006, the Second Circuit denied the petition for review, affirming the BIA's and the Immigration Judge's findings that the statutory and regulatory scheme does not allow Mr. Tsimmer any right to

renew his denied Form I-751 before the Immigration Judge because he was placed in exclusion proceedings. (App. 65a-67).

On September 29, 2006, Ms. Tsimmer commenced a civil action in the U.S. District Court for the Southern District of New York, challenging the legality of the Government's action in terminating his conditional resident status in violation of the APA and due process, alleging that: (1) the Government is collaterally estopped from denying the I-751 petition solely on the ground that Mr. Tsimmer committed marriage fraud, in light of the Immigration Judge's finding that Mr. Tsimmer never committed fraud; (2) the Government's termination of his conditional resident status based solely on marriage fraud finding violates the APA because it is contrary to the BIA precedent holding that mere separation of previously married couples cannot be a basis for a marriage fraud finding, because the test is whether the marriage was *bona fide* at its inception; and (3) absent the District Court action, Mr. Tsimmer has no access to any administrative or judicial review of the Service's decision, which creates serious constitutional concerns. (App. 29a-61a).

By a precedent decision dates April 22, 2008, *Tsimmer v. Gantner*, 550 F. Supp.2d 438 (S.D.N.Y. 2008), the District Court, upon the Government's motion, dismissed the instant action for lack of subject matter jurisdiction, virtually rubber stamping the Government's arguments. (App. 7a-26a). First, relying solely on one paragraph in the complaint, the District Court found that it lacked

subject matter jurisdiction under the REAL ID Act because, "on any fair reading, the complaint challenges Tsimmer's exclusion order," and the District Court lacks jurisdiction to review exclusion orders. (App. 20a-22a). Second, the District Court found that Mr. Tsimmer's District Court action is barred by *res judicata* because the District Court deemed Mr. Tsimmer's claims to be substantially the same claims that the Second Circuit previously considered and rejected because they arose out of the same "nucleus" of operative facts. (App. 22a-26a).

By a summary order dated November 24, 2009, the Second Circuit affirmed the District Court's decision "for the substantive reasons detailed in the District Court's opinion." (App. 6a). The Second Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. On February 4, 2010, the Second Circuit denied Mr. Tsimmer's petition for panel rehearing, or in the alternative, for rehearing *en banc*. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S "NUCLEUS OF OPERATIVE FACT" TEST USED TO APPLY THE DOCTRINE OF *RES JUDICATA* IS RESULTING IN THE DOCTRINE BEING APPLIED WHERE THERE HAS NOT BEEN A FINAL JUDGMENT ON THE MERITS, AS REQUIRED BY THIS COURT.

By affirming the District Court's precedent decision, the Second Circuit has adopted a view of the doctrine of *res judicata* that is contrary to the holdings of this Court. In *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 398 (1981), this Court held that, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." The District Court relied upon two Second Circuit cases and one Southern District of New York case to conclude that *res judicata* bars any subsequent suit involving the same 'claim' or 'nucleus of operative fact.' (App. 24a). These cases were: *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000); *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990); *Lacy v. Principi*, 317 F. Supp. 2d 444, 447 (S.D.N.Y. 2004). (App. 24a). However, this Court has never held that *res judicata* bars any subsequent suit that merely involves the same "claim" or "nucleus of operative fact." The test utilized by the District Court, based upon Second Circuit precedent, has no concern with

whether or not there has been a final judgment on the merits in determining whether an action is barred by *res judicata*, as required by this Court. The District Court's precedent decision, which was affirmed by the Second Circuit, stated "[e]ven if Tsimmer presented this Court with a previously unraised argument over the denial of his I-751 petition, that claim would arise from the same 'nucleus of operative fact' as his prior Second Circuit petition for review, and would thus be barred as *res judicata*." (App. 24a-25a).

The Second Circuit, as recognized by the District Court, has adopted a test for *res judicata*, which is contrary to the test established by this Court. The Second Circuit's test for whether an action is barred by *res judicata* is not determined by whether there was a final judgment on the merits. In the case at hand, because this "nucleus of operative fact" test was used, Mr. Tsimmer's District Court action was dismissed, despite the fact that in the dismissal of his petition for review, the Second Circuit did not render a final judgment on the merits that Mr. Tsimmer's I-751 was properly denied by the former INS. In Mr. Tsimmer's petition for review, the issue was whether an immigration judge had jurisdiction to hold a *de novo* hearing on Mr. Tsimmer's Form I-751. (App. 65a-66a). In Mr. Tsimmer's District Court action, the issue was whether the former INS denied Mr. Tsimmer's I-751 in a manner that was either: (1) arbitrary and capricious; or (2) a due process violation. (App. 49a-59a). The dismissal of Mr. Tsimmer's petition for review seeking to have an Immigration Judge hold a *de novo* hearing on his denied I-751 should have no

impact upon Mr. Tsimmer's District Court action under the APA to review the former INS's denial of his I-751. However, this absurd result has occurred because the Second Circuit has adopted a rule that is inconsistent with this Court's precedent decisions.[3] The result in this case is not an aberration. The District Court's decision was based upon *Waldman v. Village of Kiryas Joel*, *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, and *Lacy v. Principi*. Thus, unless this Court grants the petition for writ of *certiorari*, erroneous decisions like the District Court's precedent decision will continue to occur.

II. THIS COURT'S PRECEDENT REQUIRES THAT THE REAL ID ACT'S JURISDICTION LIMITING PROVISIONS BE READ NARROWLY.

By adopting the precedent of the District Court, the Second Circuit has adopted an interpretation of REAL ID Act of 2005 ("REAL ID Act"), § 106(a)(5), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), which is overly expansive, inconsistent with the plain language of the statute, inconsistent with this Court's rules of statutory

---

[3] Of course, the biggest absurdity is that in the exclusion proceedings, the Immigration Judge did not sustain the INS charge that Mr. Tsimmer committed immigration fraud. (App. 46a-47a). This is the type of finding that should be afforded *res judicata* because it is a finding on the merits. However, due to the erroneous jurisdictional findings by the District Court, the INS' improper denial of Mr. Tsimmer's I-751 petition will be permitted to remain valid.

construction, and the precedent decisions of the Board.

REAL ID Act § 106(a)(5) created INA § 242(a)(5), 8 U.S.C. § 1252(a)(5), which provides:

> EXCLUSIVE MEANS OF REVIEW.-- Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

The District Court incorrectly viewed Mr. Tsimmer's complaint as seeking to challenge his exclusion order because, if the District Court

reviewed the I-751 denial and ruled in Mr. Tsimmer's favor, Mr. Tsimmer's exclusion order would be not be "challenged." (App. 20a). By its express language, REAL ID Act § 106(a) only precludes "judicial review" of an "order." Mr. Tsimmer's complaint did not seek direct review of his exclusion order. While reviewing the denial of his I-751 by the former INS could result in his exclusion order being nullified, this would not constitute "judicial review" of his exclusion "order." The District Court, as affirmed by the Second Circuit, has read a jurisdiction stripping statute broadly, rather than narrowly. This is inconsistent with this Court's mandate that there be a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Moreover, the District Court's precedent decision, as affirmed by the Second Circuit, is also inconsistent with the precedent of the BIA. Mr. Tsimmer's final order of exclusion merely resulted in a finding that Mr. Tsimmer is inadmissible pursuant to INA § 212(a)(5)(A)(i), 8 U.S.C. § 1182(a)(5)(A)(i), for seeking to enter the U.S. for the purpose of performing skilled or unskilled labor without labor certification and INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant who is seeking to enter the U.S. without a valid unexpired immigrant visa. (App. 46a). The District Court's review of Mr. Tsimmer's I-751 would not result in a re-determination of whether Mr. Tsimmer was properly deemed inadmissible pursuant to INA § 212(a)(5)(A)(i) and INA § 212(a)(7)(A)(i)(I) in his exclusion proceedings, but whether Mr. Tsimmer's I-

751 should have been approved by the former INS, which would result in Mr. Tsimmer no longer being inadmissible. Based upon a similar rational, the Board has long held that an alien with a final order of exclusion may apply for adjustment of status before the District Director of INS. *See, e.g., Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009); *Matter of Castro*, 21 I. & N. Dec. 379 (BIA 1976); *Matter of Wong*, 12 I. & N. Dec. 407 (BIA 1967); *Matter of C-H*, 9 I & N Dec. 265 (Asst. Comm. 1961), *Matter of Manneh*, 16 I. & N. Dec. 272 (BIA 1977). Based upon this clearly established Board precedent, a review of the denial of Mr. Tsimmer's I-751 by the former INS should not be construed as a challenge to Mr. Tsimmer's exclusion order.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

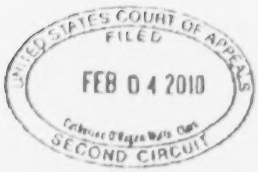
Dated: March 31, 2010

Respectfully submitted,

By:_____

Matthew L. Guadagno
Counsel of Record
Kerry W. Bretz
Jules E. Coven
BRETZ & COVEN, LLP
305 Broadway, Suite 100
New York, NY 10007
(212) 267-2555

Attorneys for Petitioner



UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of February, two thousand ten.

Leo Tsimmer, .

Plaintiff-Appellant,

v.

Director Andrea Quarantillo, New York District Director of the United States Citizenship and Immigration Services; Director Ruth A. Dorochoff, Chicago District of Director of the United States Citizenship and Immigration Services; Officer-in-Charge Kate Leopole, Milwaukee Sub-Office, United States Citizenship and Immigration Services; Secretary Janet Napolitano, of the Department of Homeland Security; Acting Deputy Director Michael Aytes, of the United States Citizenship and Immigration Services; Department of Homeland Security; U.S. Citizenship and Immigration Services; and Acting U.S. Attorney Lev Dassin, [1]

Defendants-Appellees.

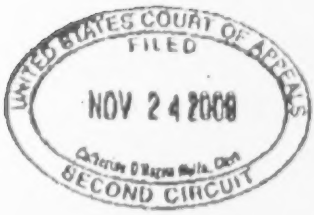
---

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), the public officers who have ceased to hold office are removed and the public officers' successors are automatically substituted.

Leo Tsimmer having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A ,SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2 . USCOURTS .GOV/). IF NO COPY IS SERVED BY REASON OF

THE:AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBUR OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of November, two thousand nine.

PRESENT: ROBERT D. SACK,
BARRINGTON D. PARKER,
RICHARD C. WESLEY,
Circuit Judges.

Leo Tsimmer,

Plaintiff-Appellant,

v.

Director Andrea Quarantillo, New York Director of the United States Citizenship and Immigrations Services; Director Ruth A. Dorochoff, Chicago District of Director of the United States Citizenship and Immigration Services; Officer-in-Charge Kate Leopole, Milwaukee Sub-Office, United States Citizenship and Immigration Services; Secretary Janet Napolitano, of the Department of Homeland Security; Acting Deputy Director Michael Aytes, of the United States Citizenship and Immigration Services; Department of Homeland Security; U.S.

Citizenship and Immigration Services; and Acting U.S. Attorney Lev Dassin, [1]

Defendants-Appellees.

APPEARING FOR PLAINTIFF-APPELLANT:

DAVID KWANG SAO KIM, (Matthew L. Guadagno, Kerry W. Bretz, and Jules E. Coven, *on the brief)* Bretz & Coven, LLP, New York, NY

APPEARING FOR DEFENDANTS-APPELLEES:

F. JAMES LOPREST, JR., Special Assistant United States Attorney, and Ross E. Morrison, Assistant United States Attorney *(for* Lev L. Dassin, Acting United States Attorney for the Southern District of New York), New York, NY

Appeal from the United States District Court for the Southern District of New York (McMahon, *J.).*

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and hereby is AFFIRMED:

Appellant Leo Tsimmer ("Tsimmer") appeals from a final judgment entered by the United States District Court for the Southern District of New York (McMahon, *J.)* on April 25, 2008, dismissing Tsimmer's complaint for lack of subject matter jurisdiction. We assume the parties' familiarity with

---

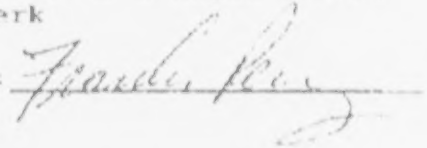
[1] Pursuant to Federal Rule of Appellate Procedure 43(c) (2), the public officers who have ceased to hold office are removed and the public officers' successors are automatically substituted.

the underlying facts, the procedural history of the case, and the issues on appeal.

In our review of a dismissal of a complaint for lack of subject matter jurisdiction, we review the District Court's factual findings for clear error and legal conclusions *de novo*. *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996).

We AFFIRM for the substantive reasons detailed in the District Court's opinion.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

BY: 

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/23/08

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO TSIMMER (A#29-449-695)

Plaintiff,

v.

MARY ANN GANTNER, New York Director of the United States Citizenship and Immigration Services ("USCIS"); RUTH A. DOROCHOFF, Chicago District Director, USCIS; KAY LEOPOLE, Office-in-Charge; Milwaukee Sub Office, USCIS; MICHAEL CHERTOFF, Secretary of Department of Homeland Security; EMILIO T. GONZALEZ, Director of USCIS, DEPARTMENT OF HOMELAND SECURITY; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

DECISION AND ORDER GRANTING THE GOVERNMENT'S MOTION TO DISMISS

McMahon, J.:

Defendants Mary Ann Gantner, District Director of the New York District of United States Citizenship and Immigration Services ("CIS");[1] Ruth A. Dorochoff, District Director of the CIS's Chicago District; Kay Leopole, Officer-in-Charge of the CIS's Milwaukee Sub-Office; Michael Chertoff, United States Secretary of Homeland Security; Emilio T. Gonzalez, Director of the CIS; the Department of Homeland Security; and the CIS (collectively, "defendants" or "Government"), have moved to dismiss the complaint of plaintiff Leo Tsimmer, A#29-449-695 ("plaintiff' or "Tsimmer") pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure because: (1) the complaint is barred by a decision of the United States Court of Appeals for the Second Circuit in another case of plaintiff's; (2) the complaint is barred by the doctrine of collateral estoppel; (3) the complaint is *res judicata*; (4) the Court lacks subject matter jurisdiction to consider the complaint; and (5) the complaint fails to state a claim upon which the Court may grant relief. This action is the latest in a long line of attempts by plaintiff to forestall his lawful exclusion from the country. He has not yet won a round, but he has managed, by his constant litigating, to forestall his deportation.

---

[1] Andrea Quarantillo has succeeded Mary Ann Gantner as the District Director of the CIS's New York District and, therefore, her name should be substituted as defendant, pursuant to Fed. R. Civ. P. 25(d)(1).

Because the court lacks subject matter jurisdiction over the claims asserted, the case is dismissed. If I had jurisdiction to consider the merits, I would conclude that the plaintiff's claims are barred by res judicata and collateral estoppel.

I. Background

A. The Expiration of Tsimmer's Conditional Resident Status

Tsimmer is a 39-year-old native and citizen of Russia. Record at 283.[2] On December 18, 1989, he married Bonnie Jean Verhunce ("Verhunce"), a United States citizen, in Madison, Wisconsin, where he was a student. *Id.* at 284. Based on that marriage, the INS granted Tsimmer the status of a conditional lawful resident of the United States, with an expiration date of April 23, 1992. *Id.* at 281.[3]

On or about March 17, 1992, the INS was contacted by Kelly Hayes ("Hayes") regarding Tsimmer. *Id.* at 276-77. Hayes gave the INS a sworn

---

[2] References to the "Record" are to pages of the record of the administrative proceedings underlying the final order of exclusion against Tsimmer, as certified by the Executive Office for Immigration Review of the United States Department of Justice on November 18, 2002, and which was filed with the Second Circuit on November 22, 2002. Loprest decl., Ex. B (Feb 21, 2007).

[3] An alien seeking to obtain permanent residency based upon a marriage to an United States citizen may obtain such status only conditionally, *see* 8 U.S.C. § 1186a(a)(I), and is required to file a joint petition ("I-751 petition") with his or spouse to remove the condition in order to achieve unconditional lawful permanent resident status, *see id.* § 1186a(c)(2).

statement, *see id.* at 276-79, in which she stated that her roommate, Lisa Christopher, was Tsimmer's paramour. *Id.* at 276. Hayes stated that Tsimmer's relationship with Verhunce was not a "true marriage" and that Verhunce "had only married [Tsimmer] to help him gain U.S. residency." *Id.* at 279.

On or about April 17, 1992 - six days before the expiration of Tsimmer's conditional resident status - Tsimmer and Verhunce filed a joint I-751 petition to remove the condition. *Id.* at 40-41; 283-84. At first, the INS rejected the I-751 petition because Tsimmer and Verhunce had failed to remit the correct filing fee, *see id.* at 37-38; see also 8 C.F.R. 216.4(a) (1992); however, Tsimmer and Verhunce later filed the petition with the correct fee on April 29, 1992 - one week past the statutory deadline, *see Record* at 40. On August 31, 1992, the INS interviewed Tsimmer and Verhunce at its Milwaukee offices in connection with the petition, at which time they claimed to live at the same Madison address. *Id.* at 262, 276. However, because Tsimmer and Verhunce provided little documentary evidence that their marriage was bona fide - and because of Hayes's earlier communication - the INS determined to investigate their claims further. *See id.* at 262, 276-77.[4]

---

[4] Zimmer and Verhunce submitted only a telephone bill, a tax return for 1991, two letters from friends, and an apartment lease for August 1990 through March 1991 listing their names and those of two roommates' as tenants, as evidence their marriage was *bona fide*. *See Record* 37, 260-61.

In response to an INS inquiry, the Wisconsin Department of Transportation informed the INS that its records showed different Madison addresses for Verhunce and Tsimmer. *See* Record at 262-63. When INS agents visited the first address, in August 1995, an individual claiming to be the landlady of the premises informed them that Verhunce was a tenant but that Tsimmer had never lived there. *Id.* The landlady also told the agents Verhunce had been in a romantic relationship with a man other than Tsimmer for the previous three years. *Id.* When the INS agents visited the other Madison address, they discovered Verhunce living there; she informed the agents that she and Tsimmer had separated approximately three years earlier. *Id.* at 263. Verhunce also told the agents that, contrary to their statements at the August 1992 interview, she and Tsimmer had not been living together at the same address at that time. *Id.* Verhunce told the agents Tsimmer was "living in Moscow," but was unable to provide an address for him. *Id.*[5] 5

On March 28, 1996, the District Director of the INS's Chicago district office issued a decision

---

[5] In May 1995, the INS had granted Tsimmer "advance parole" to reenter the United States following travel abroad while his I-751 petition was pending; in July 1995, upon Tsimmer's return from Russia, the INS paroled him into the United States. *See* Record 289; *see also* 8 C.F.R. § 245.2(a)(4)(ii) (1994) (discretionary grant of advance parole permits alien without legal status to reenter United States after departing for travel abroad, without departure constituting waiver of any pending application).

denying the I-751 petition. *Record* at 250-54.[6] The District Director pointed to the dearth of evidence indicating that the marriage between Verhunce and Tsimmer was *bona fide*; he also summarized the statements given to the INS by Verhunce, Hayes, and the landlady, and noted that Verhunce and Tsimmer were getting divorced. *Id.* at 250-52. The "substantial derogatory information" convinced the District Director that Tsimmer and Verhunce "were involved in a marriage of convenience for the purpose of obtaining immigration benefits" for Tsimmer. *Id.* at 253. Upon denying the petition, the INS referred Tsimmer to the Immigration Court in Chicago for the commencement of an administrative proceeding to exclude and deport Tsimmer from the United States. *Id.*

B. Tsimmer's Administrative Proceeding and Exclusion Order

On March 28, 1996, the INS issued Tsimmer a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge (HU"). *Record* at 290. The notice charged Tsimmer with being excludable from the United States pursuant to INA §§ 212(a)(5)(A)(i), 212(a)(6)(C)(i), and 212(a)(7)(A)(i)(l), respectively, as an alien: (1) seeking admission to the country for the purposes of performing skilled or unskilled labor; (2) who

---

[6] On or about September 6, 1995, Tsimmer's attorney sent the INS a letter (not in the record) claiming Verhunce and Tsimmer were getting divorced, and asking the INS to waive the joint petition requirement. *See, e.g., Record* at 256 (INS notice referring to letter), 258-59 (marital settlement agreement).

committed fraud to secure an immigration benefit; and (3) seeking to enter the United States without a valid or unexpired immigrant visa. *Id.* at 290; see also 8 U.S.C. §§ 1182(a)(5)(A)(i), I I 82(a)(6)(C)(i), & 1182(a)(7)(A)(i)(I).

On April 8, 1997, after a number of adjournments, see Record at 240, 245-48, Tsimmer's exclusion hearing commenced before an IJ in New York.[7] Tsimmer conceded service of the INS's charging document and denied its charges. *Id.* at 241-42. On or about September 8, 1996, Tsimmer filed a motion with the IJ to terminate his exclusion proceeding or, in the alternative, to reconsider, and grant, his I-751 petition. *Id.* at 118-22.

On December 3, 1998, the IJ issued an order denying the motion and ordering Tsimmer excluded from the United States. *Id.* at 88-97 (Exclusion Proceedings, *In re* Tsimmer, No. A29-449- 695 (Dec. 3, 1998)). The IJ held the INS had not met its burden to demonstrate Tsimmer was excludable for fraud, and dismissed that charge; however, the IJ held the INS had met its burden to demonstrate Tsimmer's excludability under the two remaining charges. *Id.* at 95-96. The IJ held that Tsimmer was not assisted by the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963) (holding that a lawful permanent resident alien did not interrupt the continuity of his United States

[7] Although Tsimmer's exclusion proceeding was originally scheduled to begin before an IJ in Chicago on November 22, 1996, the Immigration Court changed the venue of the proceeding to New York, at Tsimmer's request. *See Record* at 130-34,247-49.

residence by an absence that was "brief, casual, and innocent"), because that decision's holding was inapplicable to conditional permanent residents, like Tsimmer. *Id.* at 91 -92. Finally, the IJ rejected Tsimmer's request for review of his I-751 petition, holding that the regulations did not make such review available to aliens in exclusion proceedings. *Id.* at 94-95. The IJ certified his decision to the BIA for its review. *Id.* at 97.

On July 15, 2002, the BIA issued a decision directing that Tsimmer be excluded from the United States, but for different reasons than the IJ. *See Record* at 80-82 (Termination of Proceedings, *In re Tsimmer*, No. A29-499-695 (July 12,2002)). Unlike the IJ, the BIA held that Tsimmer's status as a conditional lawful resident expired by operation of law on April 23, 1992, when Tsimmer and Verhunce failed to file a timely I-751 petition. *Id.* at 81. The BIA further held that Tsimmer's conditional resident status was not restored by the INS District Director's late consideration of the petition. *Id.* (citing 8 C.F.R. § 216.4(a)(6) (1994)). In light of the expiration of Tsimmer's status in 1992, the BIA held he could not have reentered the United States after foreign travel absent a grant of advance parole - and that, therefore, the INS properly placed him into an exclusion proceeding (as opposed to a deportation proceeding) when he attempted to reenter the country upon his return from Russia in July 1995. *Id.* at 81-82. Finally, the BIA held (as had the IJ) that Tsimmer, as an excludable alien, was not entitled to challenge the INS's determination that his marriage to Verhunce was not *bona fide*. *Id.*

On or about August 13, 2002, Tsimmer filed a motion with the BIA to vacate its July 15, 2002 decision and reopen his exclusion proceeding. Record at 6; *see also* 7-31 (supporting declarations), 32-79 (exhibits). In the motion, Tsimmer argued that the BIA had erred by failing to hold that the INS was estopped from excluding him because it had engaged in "affirmative misconduct" by incorrectly advising him to seek advance parole before traveling to Russia in 1995. *Id.* at 4-7. Tsimmer's motion also requested that his administrative proceeding be reopened and remanded to the IJ to consider applications he enclosed for various forms of relief from exclusion, including, *inter alia*, asylum, pursuant to INA § 208(a), 8 U.S.C. § 1158(a); withholding of exclusion, pursuant to INA § 243(h)(1), 8 U.S.C. § 1253(h)(1); and deferral of exclusion, under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), 1465 U.N.T.S. 85, G.A. Res. 39/46, U.N. Doc. A/39/51; 23 LL.M. 1027 (1984). *See Record* at 65-76.

The BIA denied Tsimmer's motion in a decision dated January 17, 2003. *See* Supplemental Loprest decl., Ex. A, Mar. 23, 2007. The BIA concluded that Tsimmer had failed to present it with any facts or issues that were not, or could not have been, presented to the [IJ] during his exclusion hearing." *Id.* at 1. The BIA also held that facts alleged in Tsimmer's motion did not establish his *prima facie* eligibility for asylum, withholding of exclusion or Torture Convention relief. *Id.* Finally, the BIA held that Tsimmer had failed to explain why

he had not applied for those forms of relief earlier. *Id.* at 1-2.

C. Tsimmer's Petition for Review in the Second Circuit

Tsimmer filed a timely petition for review of the BIA's decisions in the Second Circuit, pursuant to INA § 242(a). In his petition for review, Tsimmer again argued that the BIA had erred by failing to hold the INS was estopped from excluding him because it had engaged in "affirmative misconduct" by incorrectly advising him to seek advance parole before traveling to Russia in 1995. *See* Brief for Petitioner at 12-13, *Tsimmer v. Gonzales*, No. 02-4383/03-4343 (2d Cir. May 26, 2005) (Summary Order). He argued that he was deprived of due process of law by the IJ's refusal to reconsider, and grant, his I-751 petition. *See id.* at 21-24. Finally, he argued that BIA had "overlooked" aspects of his case, *see id.* at 24-27, including "objectively reasonable" evidence that he was entitled to asylum, withholding of exclusion, and Torture Convention relief, *see id.* at 28-42.

On May 26, 2006, the Second Circuit (Cardamone, Jacobs, and Wesley, C.JJ.) denied Tsimmer's review petition. *Tsimmer v. Gonzales*, 02-4383/03-4343 (2d Cir. May 26, 2005) (Summary Order) ("*Tsimmer I*"). In reviewing the BIA's July 15, 2002 decision, the Court of Appeals upheld the BIA's refusal to terminate Tsimmer's removal proceeding or revisit the INS's denial of his I-751 petition. *See Tsimmer I* at 2-4. The Court of Appeals held that Tsimmer was properly in exclusion proceedings

because ,"[w]hen he failed to file his I-751 petition within two years of the date he was granted conditional permanent resident status, that status terminated 'automatic[ally].'" *Id.* at 2 (quoting 8 C.F.R. § 216.4(a)(6) (1992)). The Court of Appeals further held:

> Although the regulations provide that permanent resident status may ultimately be 'restored' if the petition is approved, Tsimmer's petition was ultimately denied. Therefore, when he traveled to Russia while his petition was still pending, he was not a lawful permanent resident, but rather a petitioner seeking to have that status restored. [Therefore], his parole into the United States upon his return did not operate as an admission into the country [and] when his underlying petition was denied and his parole was terminated, he was properly placed in exclusion - rather than deportation - proceedings.

Id. at 2-3 (citing, *inter alia, Leng May Ma v. Barber*. 357 U.S. 185, 188 (1958)).

The Court of Appeals rejected Tsimmer's constitutional challenges to the BIA's refusal to review his I-751 petition, *see Tsimmer I*, at 2 (subjecting argument to "rational basis test," citing *Fiallo v. Bell*, 430 U.S. 787,799 (1977)), noting that, "aliens in exclusion proceedings, unlike those in deportation proceedings, are not entitled to review of the denial of an I-751 petition." *id.* at 3 (citing 8 U.S.C. § 1186(c)(3)(D); 8 C.F.R § 216.4(d)(2)). The Second Circuit specifically states that "Courts have

long upheld as rational the distinction between aliens who have entered the United States and those who have not, and the granting of greater procedural and substantive rights to the former," *id.* at 3 (citing *Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982)). It ultimately concluded that:

> Congress rationally could have determined that those aliens who choose to leave the country while their applications to adjust or restore status are pending, and who are aware of their precarious situation at the time they leave, could be subject to lesser rights and safeguards upon their return and parole. Therefore, the BIA did not abuse its discretion in declining to terminate Tsimmer's exclusion proceedings, nor did it violate equal protection in declining to review the denial of his petition.

Tsimmer I at 3-4.[8]

In reviewing the BIA's January 17, 2003 decision, the Court of Appeals held the BIA acted within its discretion in denying Tsimmer's motion to reopen his exclusion proceeding. *Tsimmer I* at 4-5.

---

[8] The Court of Appeals rejected the contention that the INS was estopped from denying Tsimmer's I-751 petition, holding that he had failed to show that the INS engaged in any affirmative misconduct" with respect to the petition. *Tsimmer I* at 3 n.2 (holding the INS's "advice [to Tsimmer] was substantially correct, and it was under no obligation to provide an individualized warning as to the potential consequences of accepting the benefits of advance parole") (citing *West Covina v. Perkins*, 525 U.S. 234, 241 (1999)).

The Court of Appeals agreed with the BIA that Tsimmer had "failed to identify any errors of fact or law in [the BIA's] previous decision, and primarily repeated arguments that the BIA had already considered in his appeal." *Id.* at 4 (citation omitted). The Court of Appeals also agreed with the BIA's refusal to permit Tsimmer to apply for asylum, withholding of exclusion, and Torture Convention relief, holding:

> The BIA rationally could have determined that Tsimmer failed to establish a pri*ma facie* case of either past persecution or a well-founded fear of future persecution, because (1) his family's experiences under Stalin were too remote, and his own experiences of discrimination, insufficiently severe to constitute persecution; (2) he admitted that he did not fear persecution at the time he first entered the United States; (3) his vague allegations and translated newspaper headlines were insufficient to establish a material increase in anti-Semitism in Russia; and (4) he failed to explain why he never applied for asylum previously.

Tsimmer I at 4-5 (citing *INS v. Abudu*, 485 U.S. 94, 104-05 (1988))

Approximately one month after the Second Circuit issued its mandate in *Tsimmer I*, Plaintiff filed this action. Plaintiff now seeks an order declaring that the INS's denial of his I-751 petition was unlawful, and an order directing Defendant to restore his conditional resident status or in the

alternative provide him with an additional review of his I-751 Petition.

II. Discussion

A. The Complaint Must be Dismissed for Lack of Subject Matter Jurisdiction

The instant complaint cannot be heard by this Court. It is barred by recent legislation that excludes from the district court's jurisdiction any ability to hear challenges to Tsimmer's exclusion order. *See, e.g.*, Compl. ¶54 (claiming INS should be retroactively estopped from "taking any adverse actions based on [its] denial" of Tsimmer's I-751 petition, including, presumably, excluding Tsimmer). Specifically, § 106(a)(d)(B) of the Real ID Act, Pub. L. No. 109-13, Title I, 119 Stat. 231 (May 11, 2005), amended INA § 242, 8 U.S.C. § 1252 (governing judicial review of administrative removal, deportation, and exclusion orders) to provide:

> (5) Exclusive Means of Review - Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means of judicial review of an order of removal entered or issued under any provision of this Act ...

8 U.S.C. § 1252 (a)(5); 119 Stat. 240 (2005).

In light of the Real ID Act's broad language, the Second Circuit and its district courts have consistently held that courts lack jurisdiction to consider challenges to administrative orders of removal, deportation, and exclusion, however they are presented.[9] *See, e.g.*, *Spina v. DHS*, 470 F.3d 116, 123 (2d Cir. 2006) ("The REAL ID Act ... eliminates habeas corpus jurisdiction over final orders of deportation, exclusion, and removal, and provides that 'a petition for review filed with an appropriate court of appeals ... shall be the sole and exclusive means for judicial review' of such orders") (quoting Real ID Act); *Gittens v. Menifee*, 428 F.3d 382, 384-85 (2d Cir. 2005) (same); *In re Lawrence*, 448 F. Supp. 2d 572, 573 (S.D.N.Y. 2006) ("Pursuant to th[e Real ID Act], this Court is jurisdictionally barred from considering a challenge to a removal order."); *Saavedra De Barreto v. INS*, 427 F. Supp. 2d 51, 55 (D. Conn. 2006) (" ....district courts do not ... have jurisdiction to review claims that are not found to be independent of removal challenges") (citations omitted); *Enwonuw v. Chertoff*, No. 06 Civ. 0834(SR) 2006 WL 3833481, at *1 (W.D.N.Y. Dec. 22, 2006) ("The Court has no jurisdiction to review the merits of the removal order"); *Munoz v. Gonzales*,

---

[9] In 1996 Congress eliminated the legal distinction between exclusion and deportation proceedings, consolidating them together under the title of removal. However, this distinction applies only to cases commenced after April 1, 1997. ILLEGAL IMMIGRATION REFORM AND IMMIGRATION RESPONSIBILITY ACT, Pub.L. No.104-208, 110 Stat. 3009-594 (1996) ("IIRIRA"); *Skelly v. INS*, 168 F.3d 88,90 (2d Cir. 1999). Today aliens in exclusion are entitled a review of administrative findings in front of the IJ during their removal hearing. 8 U.S.C. 1186a(b)(2), 8 CFR 216.4 (2007).

No. 05 Civ. 6056 (SHS), 2005 WL 1644165, at *1 (S.D.N. Y. July 11, 2005) (same; dismissing habeas petition challenging removal order). In passing the REAL ID Act, Congress clearly intended "'to have all challenges to removal orders heard in a single forum,' i.e. the courts of appeals." *Spina*, 470 F.3d at 124 (quoting *Bonhometre v. Gonzales* 414 f.3d 442, 446 (3d Cir. 2005»; *see* H.R. Conf. Rep. No. 109-72, at 173-75 (2005).

Because, on any fair reading, the complaint challenges Tsimmer's exclusion order, it must be dismissed because it has been bought in a court that lacks jurisdiction to hear the matter.

B. This Court is Bound by the Second Circuit's Decision in Tsimmer I

If there were jurisdiction to consider the issues raised in the complaint, I would be constrained to dismiss the action as barred by res judicata. The Second Circuit in *Tsimmer I* considered, and rejected, substantially the same claims raised here. And to the (limited) extent that the pleading could be construed to raise new issues, they arise out of the same nucleus of operative facts as the issues adjudicated in Tsimmer I. Therefore, they could and should have been brought to light in Tsimmer I - and plaintiffs failure to do so means that they are precluded by res judicata.

There can be no doubt that the issues Tsimmer raises here were disposed of in his prior lawsuit. To the extent that Tsimmer claims the INS's denial of his I-751 petition is subject to review

for an abuse of discretion, see Compl. ¶ 57-75, the Second Circuit held such review is not available to Tsimmer because he was properly classified as an excludable alien, *see Tsimmer I*, at 3-4. Finally, although the complaint recycles Tsimmer's constitutional challenges, see Compl. ¶¶76-93, the Second Circuit rejected those claims, as well, *see Tsimmer I* at 3-4.

Tsimmer quarrels over aspects of the Second Circuit's decision in *Tsimmer I*. *See, e.g.*, Compl. ¶46 ("Although the Second Circuit found that the Board's refusal to review the denial of the I-751 petition did not violate equal protection, the Court did not explain its reasoning for that finding."). It goes almost without saying, however, that even if the Second Circuit's holdings were incorrect - which they are not - this Court could not overturn them. *See, e.g., Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2d Cir. 1973) ("It is fundamental that a district court must carry out the mandate of a court of appeals, even if the mandate was in error.").

Under the doctrine of *res judicata*, "[a] final judgement on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Legnani v. Alitalia Linee Aeree Italiane, S.p.A.*, 400 F.3d 139, 141 (2d CiT. 2005)(quoting *St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d CiT. 2000)). The touchstone of a *res judicata* determination is whether the litigant had the opportunity to obtain review of a contested issue in the earlier proceeding. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits

of an action precludes the parties or their privies from relitigating issues that were or *could have been* raised in that action.") (emphasis added); *Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir.1994) (holding "[t]here must be an identity of the issue which has necessarily been decided in the prior action and is decisive of the present action," and "there must have been a full and fair opportunity to contest the decision now said to be controlling").

The Second Circuit takes a broad view of *res judicata*, holding the doctrine bars any subsequent suit involving the same "claim" or "nucleus of operative fact." *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000); *see also, e.g., Lacy v. Principi*, 317 F. Supp. 2d 444, 447 (S.D.N. y. 2004) (*res judicata* precludes consideration of any legal theory, cause of action, or defense that could have been asserted in prior related action between parties) (citation omitted); see also *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.") (citation omitted).

That is the case here, inasmuch as Tsimmer challenges the INS's denial of his I-751 petition, which was based upon the agency's conclusion that his marriage to Verhunce had been entered into for immigration purposes. *See, e.g.*, Compl., "Wherefore" clause, ¶1. Even if Tsimmer presented this Court with a previously unraised argument over the denial of his I-751 petition, that claim would arise from the same "nucleus of operative fact" as his prior Second

Circuit petition for review, and would thus be barred as *res judicata*. *See Waldman*, 207 F.3d at 108; *see also, e.g., Sabhari v. Frazier*, 2007 WL 295261, at *12 (D. Minn. Jan. 30, 2007) (dismissing constitutional challenge to INS denial of marriage-based visa petition as *res judicata* where prior lawsuit had challenged agency determination that marriage was fraudulent and therefore current action "ar[o]se from the same nucleus of operative facts"; nonetheless granting summary judgment to alien petitioners).[10] Because Tsimmer had the opportunity in *Tsimmer I* to obtain review of the

[10] Application of the doctrine of *res judicata* is particularly appropriate here, given the historical intent of Congress to limit litigation over the efforts of excludable aliens like Tsimmer to remain in the United States. For instance, INA § 242(d)(2), 8 U.S.C. § 1252(d)(2), governing review of orders of removal, exclusion, and deportation, generally permits review only where "another court has not decided the validity of the order" already. Where discussing an earlier version of the INA, the Supreme Court held that its "plain objective [was] 'to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens.'" *Foti v. INS*, 375 U.S. 217, 225 (1963) (quoting H.R. Rep. No.1086, 87th Cong., 1st Sess. 22, at 22-24 (1961)) (discussing former INA § 106(c), 8 U.S.C. § 1255a(c)(1994)(amended and recodified at 8 U.S.C. § 1252(d)(2)(Supp. IV 1998)); see also *Jorge v. Hart*, No. 97 Civ.1119 (MBM), 1997 WL 531309, at *10 (S.D.NY Aug 28,1997) (noting that INA "essentially created a res judicata defense to a... petition filed after an alien already had obtained review"), aff'd, 6 Fed. Appx. 64 (2d Cir. 2001) (unpublished decision); *United States ex rel. Tanfara v. Esoerdy*, 347 F.2d 149, 151 (2d Cir. 1965) (holding that "legislative history reveals that Congress sought ... to eliminate dilatory litigational tactics on the part of aliens subject to deportation" orders).

claims he raises here, the claims are barred as *res judicata* as well.

Conclusion

The complaint is dismissed for want of subject matter jurisdiction.

The Clerk of the Court is directed to close the file.

Dated: April 22, 2008

U.S.D.J.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/25/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

06-CIVIL 7867 (CM)

JUDGMENT

LEO TSIMMER,

Plaintiff,

v.

MARY ANN GANTNER, et. al,

Defendants.

Defendants having moved to dismiss, and the matter having come before the Honorable Colleen McMahon, United States District Judge, and the Court, on April 22, 2008, having rendered its Decision and Order dismissing the complaint for want of subject matter jurisdiction, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Decision and Order dated April 22, 2008, the complaint is dismissed for want of subject matter jurisdiction; accordingly, the case is closed.

Dated: New York, New York

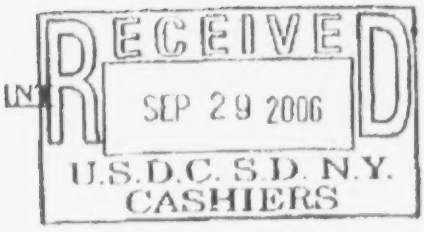
April 25, 2008

J. MICHAEL McMAHON

Clerk of Court

BY: _____

Deputy Clerk



JUDGE CASEY
CASE NO. 06-CV-7867
ECF CASE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO TSIMMER,
A# 29-449-695,

Plaintiff,

-AGAINST-

,MARY ANN GANTNER, New York District Director of the United States Citizenship and Immigration Services ("USCIS"); RUTH A. DOROCHOFF, Chicago District Director, USCIS; KAY LEOPOLE, Officer-in-Charge, Milwaukee Sub-Office, USCIS; MICHAEL CHERTOFF, SECRETARY of Department of Homeland Security; EMILIO T. GONZALEZ, Director of USCIS; DEPARTMENT of HOMELAND SECURITY; and U.S. CITIZENSHIP and IMMIGRATION SERVICE,

Defendants.

Plaintiff, by his attorneys, BRETZ & COVEN, LLP, hereby alleges, upon information and belief, as follows:

I. INTRODUCTION

1 . This action is brought to (1) declare invalid the unlawful denial of Plaintiffs I-751 Petition to Remove Conditions on Conditional Residency in violation of due process of law, and (2) compel the legacy Immigration and Naturalization Service ("INS"), now, U.S. Citizenship and Immigration Services ("CIS" or "Service"), to approve the Plaintiffs I-751 Petition or, in the alternative, provide him with a full and fair opportunity to challenge the Service's witnesses whose testimony formed the basis of the Service's denial of the Plaintiffs I-751 petition. The grounds for the requested declaratory and injunctive relief are set forth below.

II. JURISDICTION

2. This action raises the following three causes of action: (1) first cause of action, entitled "The Service is collaterally estopped from denying Mr. Tsimmer's I-751 Petition" ("collateral estoppel claim"); (2) second cause of action, entitled "The Service violated APA" ("APA claim"); and (3) third cause of action, entitled "Due Process Violation" ("due process claim").

3. This Court has jurisdiction over all three causes of action, pursuant to 28 U.S.C. § 1331 (federal subject matter jurisdiction). Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Court has jurisdiction under 28 U.S.C. § 1331,

because this action arises under the Administrative Procedure Act ("APA") (5 U.S.C. § 555(b)), the Immigration and Nationality Act ("INA") and regulations implementing it (Title 8 of the Code of Federal Regulations ("C.F.R.")), and the due process clause of the Constitution of the United States. In addition, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because this action arises under 28 U.S.C. § 2201, and seeks a declaration of the rights of Plaintiff under INA § 216, 8 U.S.C. § 1186.

4. This Court has jurisdiction over the second and third causes action under the APA. The APA authorizes district courts to review any federal administrative action which "adversely affects or aggrieves an individual. 5 U.S.C. §702. Furthermore, the APA empowers district courts to compel agency action which has been "unlawfully or unreasonably withheld." 5 U.S.C. § 706. CIS, as an administrative agency, is subject to both 5 U.S.C. § 702 and 5 U.S.C. § 706. Plaintiff contends that he has been "aggrieved" by the Service's unlawful denial of his I-751 petition solely on the ground that the Plaintiff committed marriage fraud without providing him with any meaningful opportunity to challenge the adverse evidence against him, in violation of due process, and that such denial was unlawful because it is not based on any substantial evidence and is arbitrary and capricious, in violation of APA.

5. This Court also has jurisdiction over all three causes of action, pursuant to 28 U.S.C. § 1361 (mandamus). 28 U.S.C. § 1361 provides, "[t]he district courts shall have original jurisdiction of any

action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." INA § 103, 8 U.S.C. § 1103, states that "[t]he Attorney General *shall* be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." (emphasis added). In carrying out this statutory duties, Defendants are required to comport with the APA, as required by Congress, and due process, as required by the U.S. Constitution. Because the Defendants' duties arising from the APA and due process are nondiscretionary duties, they are subject to this Court's mandamus jurisdiction.

6. Although the grant of permanent resident status is discretionary, this Court has jurisdiction over all three causes of action because Defendants terminated Mr. Tsimmer's conditional resident status without following statutory, regulatory and/or due process requirements. *See e.g.* , *Firstland Int'l Inc. v. U.S. I.N.S.*, 377 F.3d 127, 130-31 (2d Cir. 2004) (finding that revocation of visa petition was subject to judicial review because the revocation explicitly confer jurisdiction on federal district courts over causes of action claiming that the INS engages in unlawful and unconstitutional "pattern and practice" in carrying out its program, judicial review exists to review such claims, because "if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review"). *Jean v. Nelson*, 472 U.S. 846, 874, 105 S.Ct. 2992, 3007 (1985). This Court has jurisdiction to compel

Defendants to follow statutory, regulatory and/or due process requirements in terminating Mr. Tsimmer's permanent resident status.

7. This Court has jurisdiction over the first cause of action, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201,2202, to issue an order declaring that the Service's actions alleged in this complaint are unlawful and that the Service is collaterally estopped from denying Mr. Tsimmer's I-751 Petition.

III. VENUE

8. Venue of this action is proper under 28 U.S.C. § 1391(e). Plaintiff currently resides at 222 East 21 SI Street, Apt. 3D, New York, NY 10010, and Defendant Mary Ann Gantner maintains her office in this district. Now that Plaintiff resides in New York, only the CIS office in this district has the capacity to restore Plaintiffs permanent resident status by issuing him new documentary evidence of such status.

IV. PARTIES

9. Plaintiff Leo Tsimmer ("Plaintiff or "Mr. Tsimmer") is a native and citizen of Russia. He is a former resident of Madison, Wisconsin, where he resided between 1989 and 1992. He has been residing in New York, New York since July 1992. Through his marriage to his former spouse, a United States citizen, Mr. Tsimmer became a conditional

permanent resident on April 23, 1990.[1] Following an interview with Mr. Tsimmer and his former wife, the Service's Milwaukee District Office terminated Mr. Tsimmer's conditional resident status on March 28, 1996. As of the date of this complaint, no further action has been taken on Mr. Tsimmer's case.

10. Defendant Michael Chertoff is sued in his official capacity as the Secretary of the Department of Homeland Security. On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (Pub. L. 107-296), which created the new Department of Homeland Security ("DHS"). Pursuant to the provisions of the Homeland Security Act, DHS came into existence on January 24, 2003. As provided by the Homeland Security Act and by the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified ("Reorganization Plan"), the functions of the INS of the Department of Justice, and all authorities with respect to those functions, transferred to DHS on March 1, 2003, and the INS was abolished on that date. The transition and savings provisions of the Homeland Security Act, including sections 1512(d) and 1517, provide that references relating to the INS in statutes, regulations, directives or delegations of authority shall be deemed to refer to the appropriate official or component of DHS. As a result, in his official capacity, Defendant Chertoff has responsibility for

[1] See *infra*, Part VI, for background of conditional permanent resident.

the administration of the immigration laws pursuant to 8 U.S.C. § 1103, and regularly conducts business in New York that subjects him to the jurisdiction of this Court.

11. Defendant Mary Ann Gantner is sued in her official capacity. She is the New York City District Director of CIS. She is the Secretary of Homeland Security's designate for the New York City District, charged with the duty of administration and enforcement of all the functions, powers, and duties of CIS. As such, she is responsible for the administration of immigration benefits and services, including the adjudication of permanent resident applications of conditional permanent residents. Because Mr. Tsimmer now resides in New York City, Ms. Gantner's office is responsible for taking any and all actions with regard to Mr. Tsimmer's immigration case.

12. Defendant Ruth A. Dorochoff is sued in her official capacity. She is the Chicago District Director of CIS. She is the Secretary of Homeland Security's designate for the Chicago District, charged with the duty of administration and enforcement of all the functions, powers, and duties of CIS within the Chicago District, which now includes Milwaukee, Wisconsin, where Mr. Tsimmer's I-751 Petition was adjudicated. As such, she is responsible for the administration of immigration benefits and services, including the adjudication of permanent resident applications of conditional permanent residents within the Chicago District. Because Mr. Tsimmer resided in Madison, Wisconsin, at the time his I-751 Petition was denied by the Milwaukee District Office

of the legacy INS, now part of the Chicago District Office, Ms. Dorochoff's office is responsible for taking any and all actions with regard to Mr. Tsimmer's I-751 Petition.

13. Defendant Kay Leopole is sued in his official capacity. He is the Officer-in-Charge of the USCIS's Milwaukee Sub-Office, charged with the duty of administration and enforcement of all the functions, powers, and duties of CIS within jurisdiction of that Sub-Office, which includes Madison, Wisconsin, where Mr. Tsimmer resided when his I-751 Petition was adjudicated. As such, he is responsible for the administration of immigration benefits and services, including the adjudication of permanent resident applications of conditional permanent residents within the Milwaukee Sub-Office. Because Mr. Tsimmer resided in Madison, Wisconsin, at the time his I-751 Petition was denied by the Milwaukee District Office of the legacy INS, now the Milwaukee Sub-Office, Mr. Leopole's office is responsible for taking any and all actions with regard to Mr. Tsimmer's I-751 Petition.

14. Defendant DHS is an agency responsible for enforcing the Immigration and Nationality Act and granting immigration benefits under the INA. Respondent CIS is an agency that is a component of the DHS, which is responsible for granting benefits under the INA.

V. EXHAUSTION

15. Mr. Tsimmer has exhausted all administrative remedies relating to the unlawful

rescission of his permanent resident status. By a notice dated March 28, 1996, Brian R. Perryman, then Acting District Director, Milwaukee District, legacy Immigration and Naturalization Service ("INS"), terminated Mr. Tsimmer's conditional resident status. Thereafter, Mr. Tsimmer requested review of the denial of his I-751 petition before an Immigration Judge ("IJ") who declined to review for lack of jurisdiction. Athough Mr. Tsimmer sought review of the IJ's decision before the Board of Immigration Appeals ("BIA" or "Board"), and subsequently before the U.S. Court of Appeals for the Second Circuit, both the Board and the Second Circuit declined to review the IJ's decision with regard to the review of the I-751 petition.

VI. BACKGROUND OF CONDITIONAL PERMANENT RESIDENCE

16. INA § 216(a), 8 U.S.C. § 1186a(a), provides that an alien's permanent resident status will be "conditional" if it is based on a marriage that was less than two-years-old on the day the alien was given the status. The status is conditional because the alien spouse must prove that he did not enter into marriage to evade the immigration laws of the United States. INA § 216(b), 8 U.S.C. § 1186a(b).

17. To avoid losing his permanent resident status, the alien must apply, by filing a Form I-751, to "remove" the condition on his permanent residence during the 90 days before his second anniversary as a conditional resident. INA § 216(c), 8 U.S.C. § 1186a(c); 8 C.F.R. § 216.4 (2005).

18. The alien must apply to remove his condition with his spouse. *Id.* However, the alien may, through a waiver, apply to remove his condition without his spouse if the qualifying marriage was entered into in good faith, but the marriage had ended in divorce. *Id.*

19. After the condition is removed, the alien spouse officially becomes a permanent resident of the United States. INA § 216(c)(3), 8 U.S.C. § 1186a(c)(3).

20. Once permanent resident status is granted, only two procedures exist in the regulations to terminate the status. 8 C.F.R. § 216.3(b) states:

If, subsequent to the removal of the conditional basis of an alien's permanent resident status, the director determines that an alien spouse obtained permanent resident status through a marriage which was entered into for the purpose of evading the immigration laws ..., the director may institute rescission proceedings pursuant to section 246 of the Act, [8 U.S.C. § 1256], or removal proceedings under section 240 of the Act, [8 U.S.C. § 1229a].

VII. FACTS

21. Mr. Tsimmer is a native and citizen of Russia. He was born on August 19, 1967. Mr. Tsimmer is 39 years old.

22. On December 18, 1989, Mr. Tsimmer married his first wife, Bonnie Verhunce ("Ms.

Verhunce"), a United States citizen, in Madison, Wisconsin.

23. On April 23, 1990, Mr. Tsimmer was granted conditional permanent resident status based on his marriage to Ms. Verhunce. Mr. Tsimmer subsequently obtained a Resident Alien Card, which served as proof that he was a conditional permanent resident spouse of a United States citizen. INA § 216(a)(1), 8 U.S.C. § 1186a(a)(l). The card indicated that his conditional residency expires on April 23, 1992.

24. On April 17, 1992, within the statutorily prescribed time, Mr. Tsimmer filed a Form I-751 with INS, pursuant to 8 C.F.R. § 216.4(a), to remove the condition on his permanent resident status. Because the incorrect filing fee was submitted, INS returned the I-751 to Mr. Tsimmer, instructing him to re-file the petition with the correct fee. Mr. Tsimmer re-filed the petition with the correct fee, which was received by the INS on April 27, 1992, four (4) days after the prescribed deadline. The Service processed the correct filing fee on April 29, 1992.

25. The Service nonetheless deemed the re-filed petition as timely filed and interviewed Mr. Tsimmer and Ms. Verhunce for adjudication of the I-751 Petition on August 23, 1992. At this interview, Mr. Tsimmer and Ms. Verhunce submitted the following as evidence of a good faith marriage: (1) copies of telephone bills with both their names dated March 7, 1992; (2) a bank statement dated March 1, 1992 with both names; (3) a joint federal income tax

return 1991; (4) two letters from their friends, Karla Fenske and Lisa R. Levine, attesting to the validity of their marriage; and (5) an apartment lease dated April 17, 1991.

26. While his I-751 Petition was pending, the Service issued Mr. Tsimmer at least three times advance parole, which enabled him to travel abroad and return to the United States. See 8 C.F.R. § 212.2. First, on April 25, 1993, the Milwaukee District Office issued Mr. Tsimmer advance parole valid until April 24, 1994. Second, on March 28, 1995, the Chicago District Office granted Mr. Tsimmer advance parole, which expired on March 27, 1996. With this advance parole, Mr. Tsimmer left the United States for a brief business trip on or about May 27, 1995, and was paroled into the United States on July 26, 1995. Finally, on July 26, 1995, the New York City District Office issued Mr. Tsimmer advance parole, which expired on July 25, 1996. The Service stamped Mr. Tsimmer's passport, clearly indicating that he was paroled for the purpose of completion of adjudication of his "pending" I-751 Petition.

27. Mr. Tsimmer and Ms. Verhunce had been separated since on or about August 1992. They stipulated to divorce, which was approved by the divorce court in Madison, Wisconsin, on April 16, 1996.

28. On or about September 6, 1995, through Jeffrey H. Leavitt, then Mr. Tsimmer's immigration attorney, Mr. Tsimmer filed with the Service a waiver of the requirement of filing a joint I-751

petition, informing the Service that Mr. Tsimmer and Ms. Verhunce had entered into marriage in good faith, however, that they were separated and commenced divorce proceedings. Attorney Leavitt also notified the Service that Mr. Tsimmer recently moved to New York City and no longer resided in Wisconsin.

29. Pursuant to 8 C.F.R. § 216.4, an alien may, through a waiver, apply to remove his condition without his spouse if the qualifying marriage was entered into in good faith, but the marriage ends in divorce.

30. More than six (6) months after the waiver request was filed, the Service issued a Notice of Intent to Deny Petition to Remove the Conditions of Residence ("notice of intent to deny"), dated December 12, 1995. This notice stated that the Service concludes that neither Mr. Tsimmer nor Ms. Verhunce "has shown a commitment to the marriage which would indicate that the marriage was entered into solely for the purpose of evading the immigration laws of the United States" because they "have not lived together since [Mr. Tsimmer's] adjustment to that of a conditional permanent resident of the United States." The notice also listed the following four (4) reasons for the Service's intent to deny the petition: (1) the Service's investigation established that Mr. Tsimmer was involved in marriage fraud; (2) Mr. Tsimmer failed to submit documentary evidence of a bona fide marital relationship; (3) Mr. Tsimmer never established a common domicile with his wife; and (4) Mr. Tsimmer commenced divorce proceedings. The notice listed

the documents submitted by Mr. Tsimmer and Ms. Verhunce in support of their joint I-751 petition, noting that the apartment lease dated April 17, 1991 listed not only their names but also names of two other individuals - Jennifer Conboy-Federor and Igorv Federar.

31. As to the Service's finding that Mr. Tsimmer was involved in marriage fraud, the Service relied on findings based on alleged interviews of three individuals by INS officers: (1) August 8, 1995 interview of Geraldine Hanson, the landlord of the apartment building located at 915 Jennifer Street, Madison, Wisconsin, by INS officers; (2) interview with Ms. Verhunce; and (3) interview with Ms. Kelly Eileen Hays. The date and places of the interviews with Ms. Verhunce and Ms. Hays were not provided in the notice of intent to deny.

32. According to the notice of intent to deny, during her interview with INS officers, Ms. Hanson stated that: (1) Ms. Verhunce lived with her roommate, Ms. Karla Finski, for a little over three years; (2) she did not know who Mr. Tsimmer was and never met him; and (3) she knew Mr. Tsimmer received his mail at Ms. Verhunce's residence because his name was marked on the mailbox with a statement "accepting mail for Leo Tsimmer."

33. According to the notice of intent to deny, during her interview with INS officers, Ms. Verhunce stated that: (l) she and Mr. Tsimmer have been separated for more than three years and that they were not living together at the time of the I-751 interview on August 31, 1992; (2) she communicates

with Mr. Tsimmer about once a month and that he inquires about his mail; (3) nothing in the house where she was living at the time of the interview with the INS officers belonged to Mr. Tsimmer and that he did not pay the rent or bills; (4) Mr. Tsimmer was living in Russia and provided the INS officers his phone number in Russia; and (5) she has had boyfriends and Mr. Tsimmer has had girlfriends since their marriage.

34. According to the notice of intent to deny, the Service "became aware that [Mr. Tsimmer was] involved in a marriage fraud" after "Kelly Eileen Hays gave a statement to an officer of the Service and stated [Mr. Tsimmer's] involvement in a marriage fraud."

35. The notice of intent to deny provided that Mr. Tsimmer had 15 days from the date of the notice to submit whatever evidence he deemed necessary to overcome the basis of the notice. Mr. Tsimmer filed with INS a timely response to the notice, dated January 16, 1995, responding to each allegation in the notice of intent to deny.

36. In his response, Mr. Tsimmer denied the allegation of marriage fraud and stated the following: (1) although he once lived at 1802 Fordem Avenue, #15, Madison, Wisconsin 53704 with his wife, he has not been living there for over three years, and he currently resides in New York City; (2) as proof of his co-habitation with his wife at that address, he submitted a lease and statements from friends and management of the condominium complex; (3) there were four people listed in the lease

of that address because that apartment was a duplex; (4) he and his wife lived as a married couple by residing together at Sherman Terrace, Sherman Avenue and then at 1802 Fordem Avenue - both in Wisconsin, Madison; (5) they separated because of irreconcilable differences - he wanted to move to New York City for business reasons and his wife would not leave Wisconsin; (6) after he and his wife separated, his wife started living with Ms. Karla Fenske, a friend, who witnessed Mr. Tsimmer and his wife living together as a *bona fide* married couple and submitted a statement to that effect to the INS; (7) the Service's allegation that his wife told the INS officers that he was living in Russia was false because he confirmed with his wife that she only told the INS officers that he was living in New York and went to Moscow for business; (8) although he does not communicate frequently with his wife, a separated couple cannot be expected to engage in frequent communication; nonetheless, despite their separation, he and his wife still had mutual respect and feelings toward each other; (9) his possessions were not found at his wife's current address because they were separated; (10) as to Kelly Hays' allegation that he engaged in marriage fraud, the allegation was false because (a) Kelly Hays could not have known whether he and his wife entered into a *bona fide* marriage because they did not meet Kelly Hays until after they had marital problems, (b) Ms. Hays had a fight with a mutual friend of his and his wife's and has been vindictive toward him and the mutual friend ever since, and (c) therefore, Ms. Hays made her statement to the INS for the sole purpose of hurting him; (11) he and his wife entered into the

marriage in good faith, established a common domicile and showed commitment to maintain the marriage, and separated only after they realized that they could not work out their irreconcilable differences; and (12) he has been living in the U.S. for 6 years and considers the U.S. his home and has always tried to contribute to his community and the U.S. (e.g., saving a drowning person's life and volunteering for a community center in Madison, Wisconsin, and for an elderly center in New York, and promoting American business and products in Russia).

37. On March 28, 1998, the Service issued a notice entitled, "Termination of Conditional Residence Status," notifying Mr. Tsimmer that his conditional residency was terminated as of the date of the notice, pursuant to Section 216 of the Immigration and Nationality Act. The notice did not cite to any regulatory provision as the basis of its determination. The content of this notice regarding the basis of marriage fraud finding was identical to that provided in the notice of intent to deny.

38. On the same day it issued the termination of conditional residency notice, the Service also issued Form I-122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge. This notice charged Mr. Tsimmer as an excludable alien under (1) INA § 212(a)(5)(A)(i) for seeking to enter the U.S. for the purpose of performing skilled or unskilled labor without labor certification, (2) INA § 212(a)(6)(C)(i) for committing fraud to secure an immigration benefit, and (3) INA § 212(a)(7)(A)(i)(I) for seeking to enter the U.S. without a valid

unexpired immigrant visa. This notice, however, did not allege that Mr. Tsimmer engaged in marriage fraud.

39. Mr. Tsimmer, through his then counsel, moved to terminate the exclusion proceedings, arguing that he was improperly placed in exclusion proceedings because: (1) he is a returning resident who effected entry to the United States under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); and (2) he was paroled into the U.S. pursuant to a valid advance parole. Mr. Tsimmer also sought review of the denial of his I-751 petition before an Immigration Judge ("IJ") and argued that denial of such review solely on the ground that he was placed in exclusion, as opposed to deportation, proceedings, would violate his right to equal protection under the law.

40. By a decision dated December 3, 1998, the IJ ordered Mr. Tsimmer excluded, sustained two of the three charges of excludability, and certified Mr. Tsimmer's case to the Board of Immigration Appeals ("BIA" or "Board").

41. The IJ sustained the charges of excludability under INA §212(a)(5)(A)(i) for seeking to enter the U.S. for the purpose of performing skilled or unskilled labor without labor certification and under INA § 212(a)(7)(A)(i)(1) for being an immigrant who is seeking to enter the U.S. without a valid unexpired immigrant visa. The IJ, however, found that Mr. Tsimmer was not excludable under INA § 212(a)(6)(C)(i). Specifically, the IJ found that: (1) Mr. Tsimmer "did not attempt to procure entry

into the United States by fraud or misrepresentation; and (2) "The fact that his marriage was determined by the Service to be fraudulent does not convert his attempted entry into a fraudulent act."

42. With regard to review of the Service's denial of Mr. Tsimmer's I-751 petition, the IJ also found that he lacked jurisdiction to conduct the requested review because, unlike 8 C.F.R. § 216.4(d)(2), which provides such review in deportation proceedings, there was no equivalent regulatory provision allowing such review for exclusion proceedings. The IJ noted, however, that Mr. Tsimmer may have a viable equal protection claim because he was stripped of any opportunity to have the denial of his I-751 reviewed only because he was placed in exclusion, rather than deportation, proceedings. The IJ, nonetheless, found that he lacked jurisdiction to review the equal protection claim under the Board precedents.

43. By decision dated July 15, 2002, the Board affirmed the IJ's decision. As to the IJ 's conclusion that the *Fleuti* doctrine did not apply in Mr. Tsimmer's case, the Board agreed with the U's conclusion; however, the Board reached its conclusion based on different reasoning and factual finding regarding the date of termination of Mr. Tsimmer's conditional residency. The Board disagreed with the IJ's finding that Mr. Tsimmer's conditional residency terminated on March 28, 1996, the date of the Service's termination notice. Instead, the Board found that, because Mr. Tsimmer and his wife failed to file a timely joint I-751 petition, his

conditional residency terminated earlier than the date of the Service's termination decision, pursuant to 8 C.F.R. § 216.4(a)(6). Based on this finding, the Board reasoned that, although 8 C.F.R. § 211.1 (b) provided an exception for a conditional resident to be admitted as a returning resident, Mr. Tsimmer did not fall into this category because his conditional resident status was terminated while he was overseas. Based on these findings, the Board concluded that Mr. Tsimmer was properly placed in exclusion proceedings and, therefore, did not have right to have his I-751 petition reviewed by the IJ.

44. On August 14, 2002, through his counsel, Mr. Tsimmer filed a Motion to Reopen and Reconsider with the Board, arguing that: (1) the Board erred in finding that the *Fleuti* doctrine did not apply to Mr. Tsimmer and, therefore, Mr. Tsimmer was properly placed in exclusion proceedings because his conditional residency terminated on March 28, 1996, as found by the IJ, not earlier as the Board found; and (2) the INS should be equitably estopped from placing Mr. Tsimmer in exclusion proceedings and removing him from the U.S. because it engaged in affirmative misconduct, namely, (a) accepting the re-filed I-751 petition with proper fee that was filed a few days late, but at the same time arguing that Mr. Tsimmer's conditional residency terminated earlier than the date of the termination decision, and (b) misrepresenting to Mr. Tsimmer by issuing him advance parole in order to place him in exclusion, rather than deportation, proceedings; and (3) his case should be reopened to allow him to apply for asylum, withholding of removal and relief under the

Convention Against Torture ("CAT") based on changed circumstances in Russia.

45. By a decision dated January 17, 2003, the Board denied Mr. Tsimmer's Motion to Reopen and Reconsider, finding that he did not raise any new legal arguments that were overlooked by the Board previously or submit sufficient evidence establishing his prima facie eligibility for asylum, withholding of removal, or the CAT relief.

46. Mr. Tsimmer, through his attorney, filed timely petitions for review of both the BIA's August 14, 2002 and January 17, 2003 decisions with the U.S. Court of Appeals for Second Circuit. The Second Circuit consolidated both petitions and, without oral argument, summarily denied the consolidated petition, affirming the BIA's decisions. Although the Second Circuit found that the Board's refusal to review the denial of the I-751 petition did not violate equal protection, the Court did not explain its reasoning for that finding.

47. Mr. Tsimmer filed a petition for rehearing with the Second Circuit, which denied that petition on August 2, 2006. The Second Circuit issued a mandate on August 22, 2006.

VIII. CLAIM FOR RELIEF

COUNT ONE

(The Service is Collaterally Estopped from Denying Mr. Tsimmer's I-751 Petition)

48. Mr. Tsimmer, through his attorneys, realleges the allegations set forth in paragraphs 1 through 46 of this complaint.

49. The Service denied Mr. Tsimmer's I-751 solely on the ground that he committed Marriage fraud.

50. During his exclusion proceedings, Mr. Tsimmer was charged with attempting to obtain immigration benefit by fraud under *INA* § 2[2(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

51. The IJ found that Mr. Tsimmer demonstrated that he did not commit fraud.

52. The BIA and the Second Circuit affirmed the IJ's decision and did not overrule the IJ's finding that Mr. Tsimmer did not commit fraud.

53. The Service has not challenged the IJ's finding that Mr. Tsimmer did not commit fraud. Therefore, the IJ's finding that Mr. Tsimmer did not commit fraud is final, which cannot be challenged any further.

54. Since the IJ made a finding that no fraud occurred in Mr. Tsimmer's case, the Service never had and still does not have any basis for denying his I-751 Petition on the ground that he committed marriage fraud, let alone any fraud. Therefore, the Service is collaterally estopped from denying Mr. Tsimmer's I-751 Petition and taking any adverse actions based on that denial.

55. In light of the IJ's rejection of the fraud finding, the Service is under a mandatory non-discretionary duty to approve Mr. Tsimmer's I-751 Petition. Therefore, the Service must approve Mr. Tsimmer's I-751 Petition *nun pro tunc*.

Declaration Sought

56. Declare that the Service is collaterally estopped from denying Mr. Tsimmer's I-751 Petition and taking any adverse actions based on that denial.

COUNT TWO

(The Service Violated the APA)

57. Mr. Tsimmer, through his attorneys, realleges the allegations set forth in paragraphs 1 through 54 of this complaint.

58. Alternatively, the Service's denial of Mr. Tsimmer's I-751 Petition violates the APA because the denial is not supported by substantial evidence and is arbitrary and capricious.

Arbitrary and Capricious Denial of the I-751 Petition Without Considering Whether There Was Actually Fraud at the Inception of Marriage, as Required by the BIA Precedent

59. The Service's denial of Mr. Tsimmer's I-751 Petition is arbitrary and capricious because it is solely based on completely irrelevant evidence, which could not have been considered under the law.

60. The Service is bound by decisions of the BIA.

61. In *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980), the BIA held that non-legal separation is only relevant for determining whether the marriage was fraudulent at its inception. As long as the party had a bona fide intent to enter into a marriage at the inception of marriage, subsequent conduct after the marriage, no matter how unconventional, does not prove marriage fraud. If this is not the case, the Service cannot deny a petition because the parties are not living together any longer. *Id.* The Board affirmed this principle in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), holding that the fact that the petitioner and the beneficiary were not living together at the time of the visa petition denial is not evidence of a fraudulent marriage. *Id.* at 169.

62. The Service denied Mr. Tsimmer's I-751 Petition on the ground that he committed marriage fraud.

63. The Service concluded that Mr. Tsimmer committed marriage fraud because he and Ms. Verhunce were separated and did not live together since Mr. Tsimmer's adjustment to that of a conditional resident. This is factually insufficient to establish a marriage fraud.

64. This conclusion is contrary to the Board precedent, which the Service was required to follow and, therefore, the Service's denial of Mr. Tsimmer's I-751 Petition based on his separation from his wife is arbitrary and capricious.

Arbitrary and Capricious Denial of the J-751 Petition Without Ever Considering Mr. Tsimmer's Response

65. The Service's denial of Mr. Tsimmer's I-751 Petition is arbitrary and capricious because it never considered Mr. Tsimmer's response to the notice of intent to deny.

66. The content of the Service's notice of intent to deny and notice of termination of I-751 were identical with respect to the basis of the denial.

67. Although Mr. Tsimmer timely responded to each allegation of marriage fraud specified in the notice of intent to deny, none of Mr. Tsimmer's responses is mentioned in the termination notice. Therefore, the Service never considered Mr. Tsimmer's response, which is arbitrary and capricious.

Denial on I-751 Petition Without Actual Evidence of Marriage Fraud

68. The Service's denial of Mr. Tsimmer's I-751 Petition is not supported by substantial evidence because there is no actual evidence of fraud in Mr. Tsimmer's case.

69. The Service's finding of marriage fraud is solely based on unsubstantiated reports of TNS officers that had been allegedly obtained by interviewing three witnesses: (1) Ms. Verhunce, Mr. Tsimmer's former wife; (2) Ms. Geraldine Hanson, the landlord of the apartment where Ms. Verhunce was living after she separated from Mr. Tsimmer;

and (3) Ms. Kelly Eileen Hays who reported to the INS that Mr. Tsimmer engaged in marriage fraud and provided a sworn statement.

70. These reports were obtained three years after the Service interviewed Mr. Tsimmer and his former wife for I-751 adjudication and after they separated and, therefore, are irrelevant for marriage fraud determination.

71. Although these reports were allegedly prepared based on statements obtained from the three witnesses, no actual statements were obtained from Ms. Verhunce or Ms. Hanson and, therefore, are solely based on hearsay evidence.

72. Although a statement of Ms. Hays was obtained by the INS, her statement was also hearsay evidence because Mr. Tsimmer was never provided with any opportunity to examine the statement or cross-examine Ms. Hays.

73. The Service's interview report with Ms. Verhunce does not indicate that she ever stated that Mr. Tsimmer engaged in marriage fraud or that they never had *bona fide* intent to get married at the inception of their marriage. Ms. Verhunce's statement, therefore, does not support a finding that Mr. Tsimmer engaged in marriage fraud.

74. The Service's interview report with Ms. Hanson does not indicate that she ever stated that she had knowledge that Mr. Tsimmer engaged in marriage fraud or that he and Ms. Verhunce never had *bona fide* intent to get married at the inception

of their marriage. The report also does not indicate that Ms. Hanson knew Mr. Tsimmer or Ms. Verhunce prior to the time of their marriage. Ms. Hanson's statement, therefore, does not support a finding that Mr. Tsimmer engaged in marriage fraud.

75. The Service's interview report with Ms. Hays does not indicate that she actually had knowledge that Mr. Tsimmer engaged in marriage fraud or that Mr. Tsimmer and Ms. Verhunce never had *bona fide* intent to get married at the inception of their marriage. Ms. Verhunce's statement alleges marriage fraud by referencing Mr. Tsimmer's affairs with other women, which cannot be used to establish marriage fraud. In her statement, Ms. Verhunce never stated whether she knew Mr. Tsimmer or Ms. Verhunce prior to or at the inception of their marriage. In fact, she only stated that Mr. Tsimmer and Ms. Verhunce did not reside together "for the past [one and-a-half] years," which indicates that she had no knowledge regarding intent of Mr. Tsimmer and Ms. Verhunce at the inception of their marriage that commenced more than five (5) years prior to the time she made the statement to the INS. Therefore, her statement does not support a finding that Mr. Tsimmer engaged in marriage fraud.

COUNT THREE

(Due Process Violation)

Fundamental Due Process Requires that Mr. Tsimmer Receive A *De Novo* Hearing Before

this Court to Challenge the Denial of the I-751 Petition

76. Mr. Tsimmer, through his attorneys, realleges the allegations set forth in paragraphs 1 through 73 of this complaint.

77. Alternatively, due process requires review of the Service's finding by an impartial arbitrator and Mr. Tsimmer's right to challenge the adverse evidence against him. *See Mathews v. Eldridge*, 424 US 319, 96 S. Ct. 893 (1976) (where a private interest is at stake by the governmental action, due process requires that the government provide the private person with a hearing at a meaningful time and in a meaningful manner, including a full and fair opportunity to challenge the evidence against him).

78. The Service violated Mr. Tsimmer's right to due process because it never provided him with the procedural protection due process demands.

79. The Second Circuit upheld the Board's finding that an I-751 Petition cannot be reviewed in exclusion proceedings.

80. If the Court finds that there is no collateral estoppel and APA review, Mr. Tsimmer is subject to serious consequences which violates his due process rights.

81. The Service's actions alleged in this complaint violate due process because they prevent Mr. Tsimmer from having the Service's finding that

he committed marriage fraud reviewed by an impartial arbitrator and from having any opportunity to challenge the statements of the Service's witnesses, which formed the sole basis of termination of the I-751 Petition.

82. Mr. Tsimmer will not have any opportunity to challenge either the Service's I-751 denial or marriage fraud finding without being afforded a hearing by an impartial adjudicator where he can call witnesses and cross-examine the witnesses against him.

83. Mr. Tsimmer will be forever precluded from ever obtaining future immigration benefits in the U.S. because the Service's marriage fraud finding will stand without further review of that decision. *See* INA § 204(c) (prohibiting future immigration benefits for persons whom the Service found to have engaged in marriage fraud); 8 C.F.R. 204.2(a)(ii) (same).

The Service Violated Mr. Tsimmer's Right to Due Process by Failing to Provide Him with Any Meaningful Opportunity to Rebut the Service's Finding of Marriage Fraud

84. The Service's termination of Mr. Tsimmer's I-751 petition solely on the ground that he engaged in marriage fraud violates due process because it was rendered without ever providing Mr. Tsimmer with an adequate opportunity to rebut the finding of marriage fraud.

85. The Service's marriage fraud finding was solely based on the INS officers' reports that were allegedly prepared based on statements from the three witnesses referenced in this complaint.

86. These reports were never provided to Mr. Tsimmer for the purpose of responding to the notice of intent to deny and, therefore, the Service never provided Mr. Tsimmer with an opportunity to challenge the reports in responding to the notice of intent to deny.

87. Although these reports were available during Mr. Tsimmer's exclusion proceedings before the IJ, Mr. Tsimmer never had any opportunity to challenge these reports because the IJ declined to review the Service's denial of his I-751 Petition.

88. The Service did not otherwise provide Mr. Tsimmer information specific enough for him to rebut the finding of marriage fraud.

89. The notice of intent to deny did not provide the identities of the INS officers who conducted interviews of the three witnesses named in the notice. It also did not provide when and where Ms. Hays and Ms. Verhunce were interviewed by the INS officers.

90. The Service simply failed to provide Mr. Tsimmer with an adequate notice of the derogatory information and sources of the information against him that would have enabled him to adequately rebut the Service's finding of marriage fraud against him.

The Service Violated Mr. Tsimmer's Right to Due Process Because It Never Considered Mr. Tsimmer's Response to the Notice of Intent to Deny

91. Due process demands that the reviewing agency or court "actually consider the evidence and argument that a party presents." *Chen v. Gonzales*, 417 F.3d 268, 272-73 (2d Cir. 2005).

92. The Service violated Mr. Tsimmer's right to due process, because it never considered his response to the notice of intent to deny, in violation of due process.

The Service Violated Mr. Tsimmer's Right to Due Process Because Its Denial of His I-751 Petition Was Arbitrary and Capricious

93. The Service violated due process because its denial of Mr. Tsimmer's I-751 Petition was arbitrary and capricious. For this claim, Plaintiff relies on allegations set forth in paragraphs 57 through 73 in this complaint. ,.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Honorable Court to grant the following relief:

(1) Issue an Order declaring that the Service's denial of Mr. Tsimmer's I-751 petition is unlawful because,

(a) the Service is collaterally estopped from denying the I-751 petition solely on the

ground that Mr. Tsimmer committed marriage fraud in light of the IJ's finding that Mr. Tsimmer never committed fraud,

(b) the termination of Plaintiff s permanent resident status is unlawful because it violates APA,

(c) the termination of Plaintiff s permanent resident status is unlawful because it violates due process, and

(2) Issue an Order directing Defendant to either restore Mr. Tsimmer's conditional resident status or, in the alternative, provide him with a full and fair opportunity to challenge the Service's witnesses and to have his I-751 petition reviewed by an impartial arbitrator; and

(3) Grant any other and further relief that this Honorable Court may deem just and proper.

Dated: New York, New York
September 29, 2006

Respectfully submitted,
BRETZ & COVEN, LLP
305 Broadway, Suite 100
New York, NY 10007
(212) 267-2555

David K. S. Kim (DK 5869)
Kerry W. Bretz
Jules E. Coven
Matthew L. Guadagno
Attorneys for the Plaintiff

VERIFICATION

David K. S. Kim, under penalty of perjury, states the following:

1. I am an attorney admitted to practice before this Court. I am employed by Bretz & Coven, LLP, the attorneys for the Plaintiff of the foregoing Complaint.

2. I affirm the truth of the contents of the foregoing Complaint upon information and belief. The sources of my information and belief are documents provided to me by, and conversations with, the Plaintiff.

Dated: New York, New York
September 29, 2006

David K. S. Kim
DK 5869

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 02-4363-ag (L), 03-4343-ag (Con) NAC

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHERCOURTINA SUBSEQUENT STAGE OFTHIS CASE, INA RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

PRESENT

HON. RICHARD J. CARDAMONE,
HON. DENNIS JACOBS,
HON. RICHARD C. WESLEY,
Circuit Judges.

Leo Tsimmer,

Petitioner,

v.

Alberto R. Gonzalez, [1] Attorney General,

Respondent.

---

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as the respondent in this case.

FOR PETITIONER:

Michael P. DiRaimondo, Marialaina L. Masi, Mary Elizabeth Delli Pizzi, DiRaimondo & Masi LLP, Melville, New York

FOR RESPONDENT:

Michael J. Sullivan, United States Attorney for the District of Massachusetts, Mark J. Grady, Assistant United States Attorney, Boston, Massachusetts.

UPON DUE CONSIDERATION of this consolidated petition for review of two decisions of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Leo Tsummer, though counsel, petitions for review of the July 2002 BIA decision 5 affirming Immigration Judge ("IJ") Charles Honeyman's decision denying his motion to terminate exclusion proceedings, and the January 2003 BIA decision denying his motion to reopen and reconsider. We assume the parties' familiarity with the underlying facts and procedural history of the case.

A. The BIA's July 2002 Decision

Because the BIA issued an independent decision rather than adopting the reasoning of the IJ, we review only the decision of the BIA. *Yan Chen v. Gonzales*, 417 F.3d 268,271 (2d. Cir. 12 2005). Questions of law, and application of law to fact, are reviewed de novo. See *Tanoo v. INS*, 13 _ F.3d _,2006 WL 8606?4, at *2 (2d Cir. Apr. 4, 2006) (citing *Diallo v. INS*, 232 F.3d 279, 14 287 (2d Cir. 2000)).

Tsimmer's equal protection challenge regarding his inability to obtain IJ review of the denial of his I-751 is subject to the rational basis test. *See id.* (citing *Fiallo v. Bell*, 16 430 U.S. 787, 799 (1977)).

The BIA did not abuse its discretion in declining to terminate proceedings, because Tsimmer was properly in exclusion proceedings. When he failed to file his I-751 petition within two years of the date he was granted conditional permanent resident status, that status terminated "automatic[ally]." *See* 8 C.F.R. § 216.4(a)(6) (1992). Although the regulations provide that permanent resident status may ultimately be "restore[d]" if the petition is approved, *see id.*, Tsimmer's petition was ultimately denied. Therefore, when he traveled to Russia while his petition was still pending, he was not a lawful permanent resident, but rather a petitioner seeking to have that status restored. Accordingly, his status at that time was analogous to that of an applicant for permanent residence; the former INS was therefore correct when it advised him that he must obtain advance parole in order to travel abroad and return to the United States.[2] *See* 8 C.F.R. § 245.2(a)(4)(ii) (1992). However, his parole into the United States upon his return did not

[2] We reject Tsimmer's argument of affirmative misconduct by the government, as its advice was substantially correct, and it was under no obligation to provide an individualized warning as to the potential consequences of accepting the benefits of advance parole. *See, e.g., West Covina v. Perkins*, 525 U.S. 234, 241 (1999) (finding no basis in the due process clause to impose a requirement to provide individualized notice, or legal advice regarding remedies established by published, generally available statutes and case law).

operate as an admission into the country, *see* 8 U.S.C. § 1182(d)(5)(A), and therefore when his underlying petition was denied and his parole was terminated, he was properly placed in exclusion – rather than deportation - proceedings. *See* 8 C.F.R. § 245.2(a)(4)(ii); *Leng May Ma v. Barber*, 357 U.S. 185,188 (1958).

Aliens in exclusion proceedings, unlike those in deportation proceedings, are not entitled to review of the denial of an I-751 petition. *See* 8 U.S.C. § 1186a(c)(3)(D); 8 C.F.R. § 12 216.4(d)(2) (providing for review of the denial of an I-751 only in deportation proceedings). While Congress' scheme for treating certain aliens differently from others must comport with equal protection principles, it will "'not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.'" *Skelly v. INS*, 168 F.3d 88, 91 (2d Cir. 1999) (citing *Giusto v. INS*, 9 F.3d 8,10 (2d Cir. 1993) (internal citations omitted)). Courts have long upheld as rational the distinction between aliens who have entered the United States and those who have not, and the granting of greater procedural and substantive rights to the former. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982). Congress rationally could have determined that those aliens who choose to leave the country while their applications to adjust or restore status are pending, and who are aware of their precarious situation at the time they leave, could be subject to lesser rights and safeguards upon their return and parole. Therefore, the BIA did not abuse its discretion in declining to terminate Tsimmer's exclusion proceedings, nor did it violate equal

protection in declining to review the denial of his petition, consistent with the regulations.

B. The BIA's January 2003 Decision

The BIA's denial of a motion to reopen or reconsider is reviewed for abuse of discretion. *See Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006); *Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam). An abuse of discretion may be found where the BIA's decision "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner." *Kaur*, 413 F.3d at 233-34.

The BIA did not abuse its discretion in denying Tsimmer's request for reconsideration when he failed to identify any errors of fact or law in its previous decision, and primarily repeated arguments that the BIA had already considered in his appeal. *See Jing Min Liu*, 439 F.3d at 111. Likewise, the BIA acted within its discretion in denying his request for reopening, in order to allow him to apply for asylum, withholding of removal to Russia, and protection under the Convention Against Torture ("CAT"). Although an alien may file a motion to reopen in order to apply for asylum based on changed country conditions in the country of removal at any time, the burden to establish a prima facie case for relief is very heavy. *See* 8 C.F.R. § 1003.2 (c)(3)(ii). The BIA rationally could have determined that Tsimmer failed to establish a prima facie case of either past persecution or a well-founded fear of

future persecution, because (1) his family's experiences under Stalin were too remote, and his own experiences of discrimination, insufficiently severe to constitute persecution; (2) he admitted that he did not fear persecution at the time he first entered the United States; (3) his vague allegations and translated newspaper headlines were insufficient to establish a material increase in anti-Semitism in Russia; and (4) he failed to explain why he never applied for asylum previously. *See INS v. Abudu*, 485 7 U.S. 94, 104-05 (1988).

For the foregoing reasons, the consolidated petition for review is DENIED. Having completed our review, any stay of removal that the Court previously granted in either petition is VACATED, and any pending motion for a stay of removal in either petition is DENIED as moot. Any pending request for oral argument in either petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d) (1).

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: _____

Oliva M. George, Deputy Clerk

STATUTORY PROVISIONS

REAL ID Act of 2005 ("REAL ID Act"), § 106(a)(5), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), provides:

> EXCLUSIVE MEANS OF REVIEW -- Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory)."

Supreme Court, U.S.
FILED
AUG 06 2010
OFFICE OF THE CLERK

No. 09-1209

In the Supreme Court of the United States

LEO TSIMMER, PETITIONER

v.

ANDREA QUARANTILLO, NEW YORK DISTRICT DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DAVID J. KLINE
ELIZABETH J. STEVENS
KATHRYN L. MOORE
Attorneys
Department of Justice
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's holdings that it lacked jurisdiction over petitioner's challenge to his order of exclusion and that, in the alternative, petitioner's claims are barred by res judicata.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bell v. *Hood*, 327 U.S. 678 (1946) 16

Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 16, 17

Legnani v. *Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139 (2d Cir. 2005) 15

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 16

Taylor v. *Sturgell*, 128 S. Ct. 2161 (2008) 15

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 7

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 4

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1154(a)(1)(A)(i) 2

8 U.S.C. 1154(a)(1)(A)(ii) 2

Statutes and regulations—Continued Page

8 U.S.C. 1182(a)(6)(A)(i) 6
8 U.S.C. 1182(a)(6)(C)(i) 5
8 U.S.C. 1182(a)(7)(A)(i)(I) 6
8 U.S.C. 1182(d)(5) 4
8 U.S.C. 1182(d)(5)(A) 4
8 U.S.C. 1186a(a)(1) 2
8 U.S.C. 1186a(b)(2) 16
8 U.S.C. 1186a(c)(1) 2
8 U.S.C. 1186a(c)(1)(A) 2
8 U.S.C. 1186a(c)(2)(A) 2
8 U.S.C. 1186a(c)(3)(D) 13
8 U.S.C. 1186a(d)(2) 2
8 U.S.C. 1186a(d)(2)(A) 3
8 U.S.C. 1186a(d)(2)(B) 3
8 U.S.C. 1252 ..... 12, 17
8 U.S.C. 1252(a)(5) 9, 10, 11, 12, 13, 14
8 U.S.C. 1252(a)(3) 12

8 C.F.R.:

Section 216.4 3
Section 216.4(a) 2
Section 216.4(a)(6) (1992) 7
Section 216.4(d)(2) (1995) 17

Miscellaneous:

Form I-751, Petition to Remove the Conditions on Residence, http://www.uscis.gov/I-751 2

In the Supreme Court of the United States

No. 09-1209

LEO TSIMMER, PETITIONER

v.

ANDREA QUARANTILLO, NEW YORK DISTRICT DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-6a) is not published in the *Federal Reporter* but is reprinted in 353 Fed. Appx. 661. The opinion of the district court (Pet. App. 7a-26a) is reported at 550 F. Supp. 2d 438. A prior relevant order of the court of appeals (Pet. App. 63a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2009. A petition for rehearing was denied on February 4, 2010 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), an alien who marries a United States citizen is initially conferred lawful resident status on a conditional basis. 8 U.S.C. 1154(a)(1)(A)(i) and (ii), 1186a(a)(1). To remove the condition on that status, the alien and the U.S. citizen spouse must jointly petition the Attorney General within the 90-day period immediately prior to the two year anniversary of the granting of conditional lawful residency. 8 U.S.C. 1186a(c)(1) and (d)(2).

The joint petition must "request[] the removal of [the] conditional basis" and "state[], under penalty of perjury," certain information establishing that the marriage is bona fide. See 8 U.S.C. 1186a(c)(1)(A) and (d)(1). The petition must be accompanied by an administrative fee. See 8 C.F.R. 216.4(a). The petition is to be filed using Form I-751, Petition to Remove the Conditions on Residence. See http://www.uscis.gov/i-751. The failure to timely and properly file the joint petition results in the termination of resident status as of the second anniversary of the lawful admission for permanent residence. 8 U.S.C. 1186a(c)(2)(A).

2. Petitioner is a native of the former Soviet Union who married a United States citizen in 1989 in Madison, Wisconsin, when he was a student. Pet. App. 9a. Based on his marriage, petitioner was accorded conditional lawful residence on April 23, 1990. *Ibid.*

The former Immigration and Naturalization Service (INS) was then contacted by an individual who gave a sworn statement that her roommate was romantically involved with petitioner and that petitioner's marriage was a sham marriage entered into for immigration purposes. Pet. App. 9a-10a.

Six days before the expiration of petitioner's conditional resident status, he and his wife filed an I-751 petition to remove the condition on his status, but they did not include the correct filing fee. Pet. App. 10a. On April 29, 1992—one week past the statutory deadline—petitioner and his wife filed an I-751 petition with the correct fee. *Ibid.*; see 8 U.S.C. 1186a(d)(2)(A) (stating deadline).

Although petitioner's I-751 petition was untimely, the INS considered it. Pet. App. 10a; see 8 U.S.C. 1186a(d)(2)(B) (allowing consideration of untimely petitions for good cause); 8 C.F.R. 216.4 (same). In August 1992, the INS interviewed petitioner and his wife regarding their marriage. Because petitioner and his wife "provided little documentary evidence that their marriage was bona fide," the INS decided to investigate further. Pet. App. 10a. According to Wisconsin Department of Transportation records, petitioner and his wife lived at two different addresses. *Id.* at 11a. When INS agents visited the first address, the landlady told them that petitioner's wife was a tenant, that petitioner had never lived there, and that petitioner's wife "had been in a romantic relationship with a man other than [petitioner] for the previous three years." *Ibid.* When INS agents visited the second address, they found petitioner's wife living there; she "informed [them] that she and [petitioner] had separated approximately three years earlier." *Ibid.* Petitioner's wife also told the agents that she and petitioner had lied at the August 1992 interview when they told the agents that they were living together at the same address. *Ibid.* Petitioner's wife said that petitioner was living in Moscow and that she did not have an address for him. *Ibid.*

In May 1995, while the Form I-751 was pending, petitioner left the United States. Pet. App. 11a n.5. When he attempted to return in July 1995, petitioner was paroled into the United States. *Ibid.* A "paroled" alien is an alien without legal immigration status who is granted permission to enter the United States temporarily pending a decision on the alien's application for admission. 8 U.S.C. 1182(d)(5). An alien who is paroled under Section 1182(d)(5) is not considered to have been admitted into the United States. 8 U.S.C. 1182(d)(5)(A). An alien like petitioner who was paroled into the United States before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, normally was placed into exclusion rather than deportation proceedings upon revocation of parole.[1]

In September 1995, petitioner's attorney sent the INS a letter stating that petitioner and his wife were getting divorced and asking the INS to waive the joint petition requirement. Pet. App. 12a n.6.

In March 1996, the INS District Director denied the I-751 petition on the ground that petitioner failed to prove that his marriage was bona fide. Pet. App. 11a-12a; see Administrative Record (A.R.) 268-271 (letter to petitioner detailing District Director's findings). Based on the "dearth of evidence indicating that the marriage between [petitioner's wife] and [petitioner] was *bona*

---

[1] Before April 1, 1997, the INA provided two types of proceedings to remove aliens from the United States: "deportation," for aliens who had entered the United States but later became subject to expulsion, and "exclusion," for aliens who were ineligible for entry into the United States and were never admitted. IIRIRA combined deportation and exclusion hearings into a unified "removal" proceeding. See Pet. App. 21a n.9.

fide," the investigation conducted by INS agents, and the fact that petitioner and his wife were getting divorced, the District Director concluded that petitioner and his wife "were involved in a marriage of convenience for the purpose of obtaining immigration benefits." Pet. App. 12a. The INS then initiated proceedings to exclude petitioner from the United States. *Ibid.*

3. Petitioner was charged with being excludable on three grounds: as an alien seeking to enter the United States for the purposes of performing skilled or unskilled labor, see 8 U.S.C. 1182(a)(5)(A)(i); as an alien who committed fraud to secure an immigration benefit, see 8 U.S.C. 1182(a)(6)(C)(i); and as an alien seeking to enter the United States without a valid or unexpired visa, see 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 12a; A.R. 300. Petitioner denied the charges of excludability and sought termination of his exclusion proceedings and review of the INS's denial of his I-751 petition. Pet. App. 13a.

The immigration judge (IJ) found petitioner excludable and ordered him removed from the United States. A.R. 182-190; see Pet. App. 13a-14a. The IJ first held that petitioner was properly placed in exclusion proceedings because he left the United States and was paroled back in. The IJ explained that "any alien granted parole, including one granted advance parole, is deemed an applicant for admission to the United States once the parole has expired" and "may unquestionably be placed in exclusion proceedings." A.R. 187. Here, petitioner's parole expired when the INS denied his I-751 petition. A.R. 187-188. The IJ then held that petitioner was not entitled to review of his I-751 petition because at that time (prior to IIRIRA), there was "no [statutory] provision giving immigration judges the authority to review

the denial of an I-751 in exclusion proceedings." A.R. 188. Finally, the IJ determined that petitioner was excludable on the first and third grounds charged. A.R. 190. The IJ did not sustain the second charge of excludability, explaining that the March 1996 determination that petitioner's marriage was a sham did not make his earlier entry into the United States fraudulent. A.R. 191.

4. The Board of Immigration Appeals (Board) affirmed the IJ's decision, held that petitioner was excludable, and ordered him deported from the United States. A.R. 85-87; see Pet. App. 14a. The Board upheld the IJ's denial of petitioner's motion to terminate exclusion proceedings, explaining that petitioner's failure to file a timely I-751 petition automatically terminated his lawful resident status on the two-year anniversary of the granting of conditional lawful residency, and that that status was not restored by the INS's consideration of the untimely I-751 petition. A.R. 86. As a result, the Board explained, petitioner was not a conditional permanent resident at the time he left the United States, and he was appropriately placed in exclusion proceedings. *Ibid.* The Board also agreed with the IJ that the IJ could not review the denial of petitioner's I-751 petition. *Ibid.* Finally, the Board upheld the finding of excludability on the grounds found by the IJ. A.R. 87.

Petitioner filed a motion to reopen and reconsider with the Board. A.R. 12-20; see Pet. App. 15a. He argued that the INS was estopped from excluding him because it had advised him to seek advance parole before leaving the United States, and he sought to raise a variety of new claims for relief, such as asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrad-

ing Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. A.R. 15-19.

The Board denied the motion. A.R. 2-3. The Board determined that petitioner failed to meet the standard for reopening or reconsideration, because he "present-[ed] the same arguments previously argued without success on appeal or arguments without basis in law or fact." A.R. 2. The Board noted that petitioner "ha[d] not identified any change in the law affecting his appeal nor has he identified an aspect of the appeal which we overlooked during our initial review." A.R. 3. The Board also determined that petitioner "failed to present sufficient evidence to show his *prima facie* eligibility for asylum, withholding of removal, and Convention Against Torture relief or explain why he failed to previously apply for such relief." A.R. 2-3.

5. Petitioner filed petitions for review of the Board's initial decision and its decision denying the motion to reopen and reconsider, which the court of appeals consolidated.

The court of appeals denied the petitions for review in an unpublished, non-precedential order. Pet. App. 63a-68a. The court first held that the Board did not abuse its discretion in denying petitioner's request to terminate exclusion proceedings, explaining that when petitioner "failed to file his I-751 petition within two years of the date he was granted conditional permanent resident status, that status terminated 'automatic-[ally].'" *Id.* at 65a (quoting 8 C.F.R. 216.4(a)(6) (1992)). The court explained that "when [petitioner] traveled to Russia while his petition was still pending, he was not a lawful permanent resident, but rather a petitioner seeking to have that status restored." *Ibid.* The court deter-

mined that the INS "was therefore correct when it advised [petitioner] that he must obtain advance parole in order to travel abroad and return to the United States." *Ibid.* Further, the court explained, petitioner's parole "did not operate as an admission into" the United States, and petitioner therefore was "properly placed in exclusion * * * proceedings." *Id.* at 65a-66a. The court rejected petitioner's argument that the INS engaged in affirmative misconduct in advising him to seek advance parole before leaving the United States, both because its "advice was substantially correct" and because the INS "was under no obligation to provide an individualized warning as to the potential consequences of accepting the benefits of advance parole." *Id.* at 65a n.2.

The court then agreed with the Board that "[a]liens in exclusion proceedings, unlike those in deportation proceedings, are not entitled to review of the denial of an I-751 petition." Pet. App. 66a. The court rejected petitioner's equal protection challenge to that statutory framework, explaining that "Congress rationally could have determined that those aliens who choose to leave the country while their applications to adjust or restore status are pending, and who are aware of their precarious situation at the time they leave, could be subject to lesser rights and safeguards upon their return and parole." *Ibid.*

Finally, the court concluded that the Board did not abuse its discretion in denying petitioner's motion to reopen or reconsider. Pet. App. 67a-68a. The court determined that the Board did not abuse its discretion in denying reconsideration because petitioner "failed to identify any errors of fact or law in its previous decision, and primarily repeated arguments that the [Board] had already considered." *Id.* at 67a. The court also held that

the Board "acted within its discretion in denying [petitioner's] request for reopening," because it rationally could have decided that petitioner "failed to establish a prima facie case of * * * future persecution." *Id.* at 67a-68a. The Board gave a variety of reasons for such a determination: petitioner's "family's experiences under Stalin were too remote"; "his own experiences of discrimination [were] insufficiently severe to constitute persecution"; petitioner "admitted that he did not fear persecution at the time he first entered the United States"; "his vague allegations and translated newspaper headlines were insufficient to establish a material increase in anti-Semitism in Russia"; and "he failed to explain why he never applied for asylum previously." *Id.* at 68a.

Petitioner filed a petition for rehearing, which was denied.

6. Petitioner then filed this action in federal district court, contending that the INS's denial of his I-751 petition was unlawful. Pet. App. 19a, 59a.

The district court dismissed the complaint for lack of subject matter jurisdiction, and, in the alternative, held that petitioner's claims were barred by res judicata and collateral estoppel. Pet. App. 7a-26a. First, the court explained that the district court lacked the authority to hear a challenge to petitioner's exclusion order under 8 U.S.C. 1252(a)(5), which provides that "a petition for review filed with an appropriate court of appeals" in compliance with Section 1252 "shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of [the INA]." See Pet. App. 20a. The court explained that in light of the statute's broad language, it has "consistently held that [district] courts lack jurisdiction to consider chal-

lenges to administrative orders of removal, deportation, and exclusion, however they are presented." *Id.* at 21a (citing cases). The court noted that, in enacting Section 1252(a)(5), "Congress clearly intended to have all challenges to removal orders heard in a single forum, i.e., the courts of appeals." *Id.* at 22a (internal quotation marks omitted). The court concluded that "[b]ecause, on any fair reading, the complaint challenges [petitioner's] exclusion order, it must be dismissed because it has been brought in a court that lacks jurisdiction to hear the matter." *Ibid.*

The court then held, in the alternative, that "[i]f there were jurisdiction to consider the issues raised in the complaint," the court would "dismiss the action as barred by res judicata." Pet. App. 22a-26a. The court explained that the court of appeals, in petitioner's prior petitions for review, "considered, and rejected, substantially the same claims raised here," and that "to the (limited) extent that the pleading could be construed to raise new issues, they arise out of the same nucleus of operative facts as the issues adjudicated in" the prior appeal and "should have been brought to light in" that case. *Id.* at 22a. The court explained that to the extent petitioner seeks review of the denial of his I-751 petition, the court of appeals had already held that review is not available because petitioner was properly classified as an excludable alien. *Id.* at 22a-23a. The court noted that "[e]ven if [petitioner] presented * * * a previously unraised argument over the denial of his I-751 petition, the claim would * * * be barred as *res judicata*" because it arose from the same nucleus of operative fact as petitioner's other claims. *Id.* at 24a-25a. Finally, the district court determined that, to the extent that the complaint "recycles [petitioner's] constitutional chal-

lenges," the court of appeals had previously rejected those claims as well, so they too were barred by res judicata. *Id.* at 23a.

7. The court of appeals affirmed in an unpublished, non-precedential opinion, Pet. App. 3a-6a, "for the substantive reasons detailed in the District Court's opinion." *Id.* at 6a.

Petitioner filed a petition for rehearing en banc, which the court denied. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in affirming the district court's decision, which dismissed his claims for lack of subject-matter jurisdiction and because they are barred by res judicata. The court of appeals' decision is correct. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and he is mistaken in contending that the decision below conflicts with a decision of this Court. Moreover, this case would present a poor vehicle for considering the underlying legal issues because the court of appeals simply affirmed the district court's decision, without further elaboration, and the court of appeals' unpublished opinion does not create binding circuit precedent. Further review of petitioner's fact-bound claims is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's holding that it lacked subject-matter jurisdiction over petitioner's claims. The district court relied upon 8 U.S.C. 1252(a)(5), which is entitled "Exclusive means of review." It provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sec-

> tions 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter.

8 U.S.C. 1252(a)(5). Through that provision, Congress made clear that the "sole and exclusive" means to challenge a removal order is a petition for review filed in the appropriate court of appeals.[2] Petitioner, therefore, was required to challenge his exclusion order through a petition for review in the court of appeals—as he did in his first trip to the Second Circuit—and he was not also entitled to challenge the exclusion order in federal district court.

Congress's intent is confirmed by another provision in Section 1252, which states that no other court may hear challenges to removal orders. Section 1252(b)(9) states that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is available only as stated in Section 1252; and that subject to very limited exceptions, "no court shall have jurisdiction, by habeas corpus under Section 2241 of title 28, or any other habeas corpus provision * * * or by any other provision of law * * * to review such an order or such questions of law or fact." 8 U.S.C. 1252(b)(9). As the district court explained, Section 1252 codifies Congress's determination that an alien's challenge to the agency's determination to exclude, deport, or remove

---

[2] As the district court correctly stated, Section 1252(a)(5)'s reference to "an order of removal" has been understood to refer to orders of removal entered post-IIRIRA and orders of exclusion and deportation entered pre-IIRIRA. Pet. App. 21a (citing cases).

him may only be raised through a petition for review of the Board's decision filed with the appropriate court of appeals. Pet. App. 21a.

Petitioner contends (Pet. 9-10) that Section 1252(a)(5) does not apply because he was not seeking to challenge his exclusion order, but rather the denial of his I-751 petition. That case-specific disagreement with the courts below does not warrant this Court's review, and, in any event, petitioner is mistaken. As the district court correctly explained, "on any fair reading, the complaint challenges [petitioner's] exclusion order." Pet. App. 22a. The complaint sought an order declaring the INS's denial of his I-751 petition to be "invalid" and "unlawful." *Id.* at 30a. But because petitioner was an alien properly in exclusion proceedings, he was "not entitled to review of the denial of an I-751 petition." *Id.* at 66a; see 8 U.S.C. 1186a(c)(3)(D) (providing for review of termination of permanent resident status only in deportation proceedings). That issue was litigated before the Board, and petitioner sought further review in the court of appeals. The court of appeals upheld the exclusion order on direct review, sustaining the Board's ruling that petitioner could not obtain review of the denial of his I-751 petition in exclusion proceedings and holding that the Board accordingly did not abuse its discretion in declining to terminate exclusion proceedings. Pet. App. 66a. Petitioner cannot revisit that decision now by attempting to reframe his claim when the relief he seeks is to remain in the United States contrary to his final order of exclusion. That is especially true in light of the broad language in Section 1252(a)(5), which manifests Congress's clear intent that any issues relating to re-

moval proceedings be heard only on petition for review in the appropriate court of appeals.[3]

In any event, even if petitioner were correct that the district court had jurisdiction over his claim, that conclusion would not change the result in this case. As described above (see pp. 3-5, *supra*), the INS District Director had ample basis to conclude that petitioner's marriage was a sham and that the I-751 petition should be denied. Petitioner and his wife provided little evidence of a bona fide marriage, and the INS investigation uncovered substantial evidence to the contrary, including evidence that petitioner and his wife were living apart, had other romantic partners, and were in the process of getting divorced. See Pet. App. 9a-11a. Petitioner does not take issue with this conclusion in his certiorari petition. Thus, even if he had conditional resident status and could challenge the denial of his I-751 petition, he would not prevail.

Finally, the question whether the courts have jurisdiction to review the denial of an I-751 petition filed by an alien who is in exclusion proceedings has little continuing significance, because Congress repealed the provisions for exclusion proceedings and deportation pro-

---

[3] Petitioner suggests that there must be a presumption in favor of judicial review of administrative action (Pet. 10), but he received that review in the court of appeals' first decision. Tellingly, petitioner has not identified any court that has read 8 U.S.C. 1252(a)(5) to allow a district court to review a claim like his.

Petitioner also contends (Pet. 10-11) that the court of appeals' decision is inconsistent with Board precedent. He is mistaken. The decisions he cites addressed the issue of jurisdiction over an application to adjust status filed by an arriving alien in removal proceedings or an alien in exclusion proceedings, not the issue of whether a challenge to the denial of a petition to remove conditions on resident status constitutes review of an order of exclusion addressed adjustment of status.

ceedings in IIRIRA in 1996. See p. 4 & n.1, *supra*. No new exclusion proceedings have been commenced since that time, and only a small and diminishing number of aliens are still pursuing judicial review of exclusion orders fourteen years later. Under the current statutory framework, all aliens may obtain review of the denial of an I-751 petition in their removal proceedings; there is no longer a distinction between exclusion and deportation proceedings. See 8 U.S.C. 1186a(b)(2). For that reason as well, the petition should be denied.

2. The court of appeals also correctly affirmed the district court's alternative holding that petitioner's claims were in any event barred. As the court of appeals has explained, under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Legnani* v. *Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005); see also, *e.g.*, *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008).

The claims petitioner raised in his complaint already had been considered and rejected by the court of appeals. Accordingly, petitioner's claims were barred by the court of appeals' mandate in the first case and by res judicata principles. Pet. App. 22a. For example, petitioner's complaint sought review of the INS's denial of his I-751 petition and restoration of his conditional resident status, *id.* at 30a, 60a, but the court of appeals had already held that petitioner's conditional permanent resident status expired and that review of the denial of his I-751 petition was unavailable because he was properly in exclusion proceedings, *id.* at 65a-66a. Petitioner's complaint also recycled his constitutional challenges to the Board's determination that the denial of

his I-751 was unreviewable, *id.* at 55a-59a, claims the court of appeals already had rejected, *id.* at 66a. To the extent petitioner sought to raise new claims before the district court arising from those events, they are barred by res judicata. See, *e.g.*, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." (emphasis added)). This case and petitioner's earlier petition for review unquestionably share a common nucleus of fact—namely, petitioner's failure to obtain lawful resident status through his marriage to a United States citizen.

Petitioner contends (Pet. 7) that the court of appeals' denial of his initial petition for review was not a "final judgment on the merits" because the court of appeals did not review the INS's determination that his marriage was a sham. But the court of appeals considered petitioner's challenge to the denial of his I-751 petition and determined that petitioner lost his conditional permanent resident status and therefore was not entitled to seek review of the denial of his I-751 petition. That was a final disposition on the merits of his claim based on the denial of his I-751 petition. Cf. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 92 (1998) (scope of cause of action "goes to the merits"); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("failure to state a proper cause of action calls for a judgment on the merits"). Moreover, petitioner is wrong to suggest (Pet. 6) that the decision below conflicts with this Court's decision in *Federated Department Stores* because it does not require a final decision on the merits. The district court *did* require such a final decision; indeed, it stated and applied the same legal

standard that this Court did in *Federated Department Stores*. See Pet. App. 23a-24a.

In any event, even if petitioner's claims were not barred, the result would be the same, because as the court of appeals correctly explained, aliens in exclusion proceedings are not entitled to review of the denial of an I-751 petition. Pet. App. 65a-66a. And, even if petitioner could obtain such review, he would not prevail, because it is his burden to establish that his marriage was bona fide, 8 C.F.R. 216.4(d)(2) (1995), and there was ample evidence that his marriage was a sham, entered into to obtain immigration benefits. See pp. 3-5, *supra*. Finally, this case would be a poor vehicle for consideration of any res judicata issues, because the court of appeals' judgment would still be correct based on another ground—that Section 1252 independently precluded petitioner from challenging his exclusion order in district court. See pp. 12-14, *supra*. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

DAVID J. KLINE
ELIZABETH J. STEVENS
KATHRYN L. MOORE
Attorneys

AUGUST 2010